UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BORG COMPRESSED STEEL CORPORATION,)
)
Plaintiff,)
)
v.) Case No. 98 CV 0030H(W)
)
NATIONAL EXCHANGE, INC.,)
)
Defendant.)

ORDER OF DEFAULT JUDGMENT

This matter comes on before the Court on Plaintiff's Motion for Entry of Default Judgment. The Court, having reviewed Plaintiff's Affidavit in Support of Entry of Default and Motion for Entry of Default, hereby enters the following Order.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant was regularly served with a copy of Plaintiff's Complaint and Summons by certified mail on January 16, 1998 and that Defendant has failed to appear or answer Plaintiff's Complaint within the time prescribed and that an Entry of Default has been entered by the Clerk on the 13th day of February, 1998.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff shall receive judgment from the Defendant National Exchange, Inc. in the sum of $210,463.60, with interest thereon at the rate of 5.23 per cent per annum until paid, together with costs in the sum of $150.00.

Dated this 26th day of February, 1998.

Judge of the District Court

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES R. GRIFFITH, **SSN: 440-70-6602**	)	
Plaintiff,	)	
v.	)	**Case No. 96-CV-0446-EA**
KENNETH S. APFEL, Commissioner of the Social Security Administration,[1]	)	
Defendant.	)	

EOD 2/27/98

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 26th day of February 1998.

Claire V. Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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[1] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Apfel is substituted for Shirley S. Chater, former Commissioner, as the defendant in this action.

(14)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAMES R. GRIFFITH, **SSN: 440-70-6602**	)	
Plaintiff,	)	
v.	)	**Case No. 96-CV-0446-EA**
KENNETH S. APFEL, Commissioner of the Social Security Administration,[1]	)	
Defendant.	)	

ORDER

Plaintiff, James R. Griffith, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying plaintiff's application for supplemental security income under the Social Security Act.[2] In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Circuit Court of Appeals.

Plaintiff asserts that the Commissioner erred where (1) the ALJ incorrectly determined that the Commissioner had established that plaintiff retained the residual functional capacity ("RFC") to

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[1] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Apfel is substituted for Shirley S. Chater, former Commissioner, as the defendant in this action.

[2] Plaintiff's January 6, 1994 application for disability benefits was denied initially (March 8, 1994) and on reconsideration (July 22, 1994). A hearing before an Administrative Law Judge (ALJ) was held March 28, 1995 in Tulsa, Oklahoma. By decision April 6, 1995, the ALJ entered the findings which are the subject of this appeal. On April 25, 1996, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

(18)

perform other work which exists in significant numbers in the national economy; and (2) the ALJ failed to properly assess plaintiff's credibility and his allegations of pain. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born October 25, 1960 and lives in Skiatook, Oklahoma. Plaintiff completed the eleventh grade and has not obtained a G.E.D. Plaintiff has held various jobs as a welder, contract laborer, yard worker, and door-to-door salesman. Plaintiff complains of severe pain in his back and feet, diabetes, and loss of mobility. Plaintiff has not worked since August 1, 1989.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of

substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[3]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1486 (10th Cir. 1991).

The only issue now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that plaintiff is not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole, and "the substantiality of the evidence

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[3] Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R.. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the RFC to perform his past relative work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Sec. of H.H.S., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternate work.

must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ concluded at Step Four that plaintiff's impairments and RFC precluded him from performing his past relevant work. But at Step Five--upon consideration of plaintiff's impairments, RFC, age, education, and work experience--the ALJ determined that plaintiff retained the RFC to perform a full range of sedentary work of an unskilled nature, and thus could perform a substantial number of jobs that exist in the national economy. Having determined that there were jobs in the national economy that plaintiff could perform, the ALJ concluded that plaintiff was not disabled under the Social Security Act at any time through the date of the decision. (R. 19-24).

IV. MEDICAL HISTORY OF PLAINTIFF

Plaintiff contends that he has been unable to work since August 1, 1989 because of back problems and diabetes which has caused ulcers on the bottom of his feet. (R. 101). Plaintiff has had diabetes since he was 19 years old and receives insulin injections. (R. 38, 132). Plaintiff first reported infected calluses on the bottom of his left foot on April 6, 1990. (R. 202). Plaintiff dropped a piece of metal on his foot while he was at work on April 23, 1990. (R. 195). His foot was not painful or swollen and he was able to walk without difficulty by May 30, 1990. (R. 186). Plaintiff fell from a set of bleachers and suffered some back pain on August 9, 1990, but was released to work on September 11, 1990. (R. 182, 183). Plaintiff was treated in October and November of 1993 for a diabetic ulceration under his left fifth toe. (R. 126, 129, 150-51, 155, 255). Plaintiff complained of

lower back pain after mowing the lawn during that same month and was given muscle relaxants. (R. 126-27).

On November 2, 1993, plaintiff was seen in the emergency room for extreme back pain, and low back strain. He was diagnosed with nerve entrapment. (R. 146, 158, 163). On November 4, 1993, Dr. Tom Denton noted that plaintiff had uncontrolled diabetes, increased lordotic curvature of the spine, a negative straight leg raising test, and an infected left foot. (R. 161-63). Plaintiff was told to lose weight, to keep his foot elevated and stay off of it as much as possible, and to do some stretching exercises of his low back. (R. 162). Plaintiff was referred to a specialist for a foot evaluation on November 19, 1993, after Dr. Denton found foot ulcers/calluses on his left foot. (R. 152). By December 10, 1993, the ulcers appeared to be healing. (R. 150).

On March 10, 1994, plaintiff complained to Dr. Timothy Malavolti of pain in his arches and discomfort from calluses that had rebuilt beneath his left toe. (R. 255). Dr. Malavolti recommended soft support in the arches of plaintiff's shoes to prevent further breakdown of his skin. Plaintiff was noted to have reduced sensation on both feet due to lack of arch support. (Id.). Dr. Malavolti recommended that plaintiff "not do any kind of job where he needs to stand any long periods of time." (Id.). Dr. Malavolti stated that standing would aggravate the breakdown of plaintiff's skin and result in possible chronic ulcerations, which could lead to osteomyelitis and amputation of the feet. (R. 255-56).

On June 10, 1994, plaintiff was treated for a diabetic carbuncle on his back which caused severe discomfort when he moved. (R. 239-45). The carbuncle was drained and six days later plaintiff was discharged from the hospital. (R. 240). The examining doctor reported that plaintiff had "good cervical, thoracic, and lumbar range of motion," had normal range of motion in his extremities,

and had no scoliosis, lordosis, or kyphosis in his spine or somatic dysfunction. (R. 242). The doctor concluded that plaintiff had diabetes, diabetic peripheral neuropathy, metabolic acidosis, and hyperchloremia. (R. 243). Plaintiff's incision healed well. (R. 246).

On June 24, 1994, plaintiff underwent a consultative examination by Dr. Steven Lee. (R. 165-67). Dr. Lee noted that in plaintiff's upper extremities there was stiffness involving his wrists and in the lower extremities stiffness involving his feet and ankle joints. (R. 166). Plaintiff's straight leg raising was limited by tight hamstrings, but no pain. (Id.). Plaintiff was flatfooted and the sole of his left foot showed thickened calluses, but no actual ulcer. (Id.). Dr. Lee reported normal flexion, extension, and later bending. (Id.). Dr. Lee detected by palpatation no tenderness over the spinous processes, costovertebral angles, sacroiliac joints, or sacrum. (Id.). A sensory function test revealed dullness to pinprick in plaintiff's feet to about the proximal one-third of the legs. (Id.). At thigh level, plaintiff started to feel the normal pinprick sensation, but both upper limbs seemed to have dullness to pinprick. (Id.). Plaintiff had a great deal of difficulty maintaining balance on one foot. (R. 166-67). Both of plaintiff's legs appeared to be normal, even though the trunk of his body was "gigantic." (R. 167). Plaintiff was unable to perform heel walking and toe walking because of pain in his feet, claiming that his feet were not strong enough. (Id.). Dr. Lee stated: "[claimant] managed to try and he seemed to be unsteady walking on the heel or the toes. I was only able to elicit deep tendon reflexes at the biceps level. The rest of the deep tendon reflexes were unresponsive with no reflexes. The straight leg raising was negative...." (Id.) Plaintiff was able to walk without use of an assistive device, and his gait in terms of speed, stability, and safety was normal. (Id.).

On July 5, 1994, plaintiff reported that he was suffering severe back pain after he manually pushed his van to another lot to have work done on it. (R. 246). Plaintiff was seen at the emergency

room on September 4, 1994, complaining of inability to walk because of extreme leg pain. (R. 173-80). Plaintiff was given pain medications, which did not relieve the pain, and a myelogram and CT scan revealed a "huge disk herniation." (R. 173). A laminectomy and diskectomy were done, and plaintiff reported immediate relief of his leg pain. (R. 173-80). Plaintiff reported that he still had some back and buttock pain. (R. 173). On November 15, 1994, Dr. Lee reported that plaintiff had stated that he was working selling fruit. Dr. Lee recommended that plaintiff not lift over forty pounds. (R. 179).

On October 15, 1995, Dr. M. Schinkel evaluated plaintiff's ability to work. (R. 345-47). Dr. Schinkel concluded that plaintiff could sit for eight hours in an eight-hour work day, stand for no time, and walk for one hour with crutches. (R. 345). Dr. Schinkel stated that plaintiff could lift up to ten pounds infrequently and carry no weight. (Id.). Dr. Schinkel stated that plaintiff could not use feet or hand controls, except for right leg controls. (Id.). Dr. Schinkel stated that plaintiff could not bend, squat, crawl, or climb, but could reach frequently while sitting. (Id.). Dr. Schinkel based his conclusions on the fact that plaintiff had a "diabetic foot ulcer" on the sole of his left foot and would be unable to bear weight on the foot until it was healed. (R. 346).

During 1995, plaintiff suffered a chronic draining abscess of the plantar surface of his left foot, which was treated with no lasting improvement. (R. 264). Plaintiff's "diabetic control was very poor due to [his] poor compliance." (R. 264, 454). Plaintiff was hospitalized in October of 1995 for debridement of the ulcer on his foot, after suffering a reaction to an arthrodesis staple in it. (R. 264). Plaintiff was given medications and released twelve days later because he was hostile and abusive to hospital personnel. (R. 264-65). Plaintiff was given orthotic support for his feet. (R. 265).

At a hearing on March 28, 1995, plaintiff stated that he had suffered "a lot of pain and loss of feeling and numbness" in his feet since he was nineteen years of age. (R. 38). Plaintiff alleged that he is "supposed to sit and elevate [his feet]" to relieve the pain. (R. 39, 45). Plaintiff admitted that he cleans his room and does his own laundry. (R. 41). Plaintiff also admitted that "[a]ll the doctors I've ever seen tell me I should be active." (R. 43). Plaintiff testified that he could lift about 25 pounds, stand or walk for forty-five minutes, and sit for the same amount of time before he has to get up. (R. 44). Plaintiff stated that he can drive and in fact drove for six hours of a ten-hour trip from Tulsa to Galveston, Texas shortly before the hearing in front of the ALJ. (R. 52).

V. REVIEW

A. Substantial Evidence

Plaintiff asserts that the ALJ erred in determining that the Commissioner at Step Five of the sequential evaluation process successfully established that plaintiff retained the RFC to perform other work which exists in significant numbers in the national economy. In particular, plaintiff points to the ALJ's evaluation of evidence of whether plaintiff is medically required to elevate a foot which is subject to recurrent diabetic ulcers. If elevation were required, plaintiff argues, plaintiff would not be able to perform even the sedentary work the ALJ has stated plaintiff is limited to and, thus, plaintiff must be found to be disabled within the meaning of the Social Security Act. This claim is without merit.

The record details plaintiff's difficulties with recurrent diabetic ulcers on his feet. On October 20, 1993, plaintiff was seen by Dr. Malavolti. Plaintiff was diagnosed as having a diabetic ulceration on his left foot that measured two centimeters by one centimeter by .3 centimeter. (R. 255). On

November 4, 1993, plaintiff was assessed by Dr. Denton as having a left foot infection. (R. 162). Dr. Denton at that time stated "[p]atient is to keep his foot elevated and off of it as much as possible." (Id.) On November 10, 1993, Dr. Denton noted a 1.5 centimeter pressure sore on plaintiff's left foot with a small amount of necrotic tissue. (R. 156). By November 30, 1993, Dr. Denton found that the sore on plaintiff's foot was one centimeter in diameter and appeared to be healing. (R. 151). Dr. Malavolti examined plaintiff on March 10, 1994 and noted that calluses had rebuilt on the left foot. (R. 255-56). Dr. Malavolti recommended that plaintiff not do any job where he would need to stand for long periods of time. (R. 255). On June 24, 1994, Dr. Lee examined plaintiff, listing his chief complaints as diabetes mellitus and an ulcer on the left foot. (R. 165). Dr. Lee wrote, "The sole of the left foot showed a thickened callous [sic], but no actual ulcer." (R. 166). On July 20, 1994, a Residual Functional Capacity Assessment was performed on plaintiff. The medical consultant determined that plaintiff could sit with normal breaks for six hours in an eight hour day. (R. 82). On October 15, 1995, Dr. Schinkel, in a "Medical Assessment of Ability to Perform Work-Related Activities," listed limitations on standing and walking by plaintiff, but stated that plaintiff could sit for eight hours in an eight-hour day, including eight hours at a time. (R. 345-47). Plaintiff was hospitalized from October 20, 1995 to November 2, 1995 for debridement of an ulcer on his left foot and removal of a metal arthrodesis staple from the left foot. (R. 264-344). Dr. Wilson stated upon plaintiff's dismissal that the prognosis was good for his foot. (R. 264-65). Discharge plans were outlined regarding plaintiff's management of his diabetes and the fashioning of orthotic supports for plaintiff's feet. (R. 264-65). No limitations on sitting were required or suggested by Dr. Wilson. (R. 264-344).

The ALJ determined:

> [T]he objective medical evidence demonstrates that the plaintiff has problems with his feet because of diabetes and Dr. Malavolti limited the claimant to a position not requiring prolonged standing. There was no requirement that the claimant elevate his feet. The objective medical evidence, therefore, requires a limitation of the claimant's work-related activities to sedentary, based on the claimant's foot problems. Dr. Malavolti is the claimant's treating physician with respect to his feet.

(R. 22).

Substantial evidence is more than a scintilla and less than a preponderance. Richardson, 402 U.S. at 401, 91 S.Ct. at 1427, 28 L.Ed.2d 842. "[This Court] closely examine[s] the record as a whole to determine whether substantial evidence supports the [Commissioner's] decision, and...fully consider[s] the evidence that detracts from [the] decision." Cruse v. United States Dep't. of Health and Human Servs., 49 F.3d 614, 617 (10th Cir. 1995). This Court has carefully reviewed the record on appeal, as well as the briefs submitted by the parties. Applying the standards set out above, it is concluded that substantial evidence supports the ALJ's determination that there is no objective limit on the plaintiff's ability to sit for long enough to perform sedentary work. Dr. Wilson's discharge plans did not require elevation of plaintiff's feet, nor was mention of elevation of the feet made in any medical record before this Court other than the single, isolated statement of Dr. Denton in November, 1993. (R. 162). In various examinations, Drs. Malavolti, Schinkel, and Lee, as well as a medical consultant, recommended that plaintiff not stand for long periods of time, but placed no limitations on plaintiff's sitting. The 1993 statement of Dr. Denton, when weighed against the remainder of the medical evidence and when considered in light of the standard of review required of this Court, is not sufficient to cause this Court to upset the judgment of the ALJ.

Plaintiff also argues that pain in his back prevents him from sitting long enough to perform sedentary work. According to plaintiff's testimony, this pain began after the microdiskectomy performed on plaintiff by Dr. Covington on September 4, 1994.[4] (R. 44). Plaintiff argues that the medical reports given by Drs. Denton and Lee should be disregarded because the back surgery occurred subsequent to their reports. This Court finds that even if those reports are disregarded, there is substantial evidence to support the ALJ's determination that plaintiff can perform sedentary work.

The ALJ, speaking to the full history of plaintiff's impairments involving his back and the effect of those impairments on plaintiff's ability to perform sedentary work, stated:

> Dr. Denton found that the claimant had negative findings with respect to his back. Dr. Lee's physical findings are consistent with Dr. Denton's physical findings, in that there was a negative straight-leg-raising and no tenderness in the low back. Dr. Lee also found the claimant had full use of his hands. Though Dr. Covington performed a microdiskectomy on the claimant in September 1994, he has released the claimant, with only a restriction on lifting to no more than 40 pounds. Both claimant's testimony and Dr. Covington's limitation on lifting are fully consistent with the maximum lifting required for sedentary work which is 10 pounds. The objective medical evidence demonstrates that the claimant has the ability to perform a full range of work-related activities at a sedentary level, in that though the claimant's standing, walking, and lifting are limited, according to the objective medical evidence, there is no objective limit on the claimant's sitting or the use of his hands.

(R. 22).

There is nothing in the statement of the ALJ to indicate that the ALJ relied on the medical reports of Drs. Denton and Lee in assessing the impact of the microdiskectomy on plaintiff's ability to perform sedentary work. Those reports are relevant to the ALJ's determination that plaintiff's back impairment imposes upon plaintiff certain standing, walking, and lifting limitations. Regardless, there

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[4] Plaintiff's last insured date for purposes of social security benefits is September 30, 1994. Any pain resulting from the microdiskectomy on September 4, 1994 relates back to the insured time period.

is substantial evidence to support the ALJ's determination in regard to the effect of the microdiskectomy on plaintiff's ability to perform sedentary work. Dr. Covington, who performed the microdiskectomy, stated six weeks after the surgery that plaintiff reported only "minimal" back pain. (R. 179). At an examination three months after the surgery, plaintiff again reported only "minimal" back pain. (Id.). At that time, Dr. Covington noted that plaintiff was working selling fruit and instructed plaintiff to lift no more than 40 pounds. (Id.). Dr. Covington imposed no restrictions on plaintiff's sitting or the elevation of his feet. (Id.). Moreover, the medical assessment performed by Dr. Schinkel in October of 1995, well after the microdiskectomy, stated that plaintiff could sit for eight hours in an eight-hour day, including eight hours at a time. (R. 345-47).

B. Credibility and Allegations of Pain

Nor does the subjective evidence of plaintiff's pain necessitate a reversal or remand of the ALJ's determination. Plaintiff asserts that the Commissioner erred because the ALJ failed to properly assess plaintiff's credibility regarding his allegations of back and foot pain. In particular, plaintiff argues that the ALJ did not link his findings to specific evidence. This claim is without merit.

The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the court to consider:

> (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992) (citing Luna). Accord, Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995).

This Court generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). However, the ALJ's credibility determinations must be closely and affirmatively linked and logically connected to substantial evidence. See Kepler, 68 F.3d at 391.

The ALJ discussed the evidence of pain, including both plaintiff's testimony and medical reports regarding plaintiff's back and feet. The ALJ stated that because of (1) the subjectivity of the pain alleged, (2) the subjectivity of the limitations alleged, and (3) the inability to establish through medical test results the severity of the alleged pain and limitations, he was required to evaluate any evidence presented that could reasonably be expected to produce such pain and limitations. (R. 21). The ALJ stated that he had considered, in making his determination, the nature, location, onset, duration, frequency, radiation, and intensity of any pain; precipitating and aggravating factors such as movement, activity, and environmental conditions; the type, dosage, effectiveness, and adverse side-effects of medications; treatment other than medication for the relief of pain; functional restrictions; plaintiff's daily activities; and plaintiff's demeanor at the hearing. (R. 21).

The Tenth Circuit has stated that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777.

Considering all the evidence, both objective and subjective, this Court finds that the ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that the plaintiff's complaints of pain and other symptomatology were disproportionate to the objective findings and not credible beyond requiring certain standing, walking, and lifting limitations. Plaintiff's allegations of disabling pain and limitations were found by the ALJ not to be fully credible. The ALJ's decision was demonstrably supported by specific and substantial evidence, in particular: the lack of objective medical findings by treating doctors, the lack of medication for severe pain, the infrequency of treatments by physicians, and the lack of discomfort shown by plaintiff at the hearing before the ALJ. All of this evidence was cited in support of a conclusion that plaintiff was not in constant, disabling pain. Because the judgment of the ALJ that plaintiff can perform sedentary work is supported by substantial evidence, this Court concludes that plaintiff is not disabled within the meaning of the Social Security Act.

VI. CONCLUSION

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 26th day of February, 1998.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SARAH G. BUSSINGER,
SSN: 447-54-3063

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 96-C-1061-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 25th day of February 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(17)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SARAH G. BUSSINGER,
SSN: 447-54-3063

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 96-C-1061-J

ORDER[2/]

Plaintiff, Sarah G. Bussinger, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff asserts that the Commissioner erred because (1) the ALJ improperly failed to consider Plaintiff's potential mental impairments and/or refer Plaintiff for a mental examination, (2) the ALJ improperly failed to consider Plaintiff's complaints of pain, and (3) the ALJ's findings as to Plaintiff's residual functional capacity are not supported by

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1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Administrative Law Judge Ralph L. Wampler (hereafter "ALJ") concluded that Plaintiff was not disabled on May 23, 1995. [R. at 477]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review. Plaintiff previously had a hearing before ALJ John M. Slater on May 16, 1991. [R. at 12].

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substantial evidence. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on April 10, 1953, and was 41 years old at the time of the hearing before the ALJ. Plaintiff testified that she completed the sixth grade, attended the seventh grade twice, and left school before completing the seventh grade, when she was 15, to marry. [R. at 483-87].

Plaintiff claims that she is disabled because of muscle spasms from sitting, pain in her spine and back, and pain in her hips, knees, and feet. [R. at 488]. Plaintiff claims that she is unable to lift more than five pounds, can stand for no longer than 15 minutes, can sit for no longer than 15 minutes, and can walk for approximately 10-15 minutes. [R. at 494-496].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ determined that Plaintiff had no past relevant work experience. The ALJ concluded that Plaintiff has the residual functional capacity to perform light work. [R. at 477]. Based on the application of the grids, the ALJ concluded that Plaintiff was not disabled. [R. at 478].

[5/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

IV. REVIEW

Initially, the Court notes that the brief filed by the Defendant is of limited assistance. Two different ALJ's conducted two separate hearings and wrote two separate opinions in this case. On May 16, 1991, ALJ John M. Slater concluded that Plaintiff was not disabled and could perform sedentary work. [R. at 12]. On May 23, 1995, ALJ Ralph L. Wampler concluded that Plaintiff was not disabled and was capable of doing light work. [R. at 475]. The Plaintiff appeals from the 1995 decision. However, the Defendant addresses only the 1991 decision, which is the first ALJ opinion to appear in the record. Admittedly, the record in this case is somewhat lengthy. The decision of the ALJ from which Plaintiff appeals is located at page 475. Defendant's failure to locate this decision is surprising, however, because Plaintiff specifically cites to the decision in Plaintiff's brief and references the exact page number. The Court urges Defendant to use more care in the future, when reviewing the record.

Failure to Evaluate Mental Disorder

Plaintiff asserts that the ALJ failed to evaluate Plaintiff's mental condition. Plaintiff urges, for the first time on appeal, that Plaintiff may suffer from somatoform disorder. Plaintiff states that such a condition is disabling and that the ALJ failed to fully develop the record with respect to Plaintiff's mental disorder.

Plaintiff never raised the possibility of a mental impairment to the ALJ or in any applications for social security. Plaintiff was adequately represented by counsel and had numerous opportunities to raise the issue of an alleged mental impairment either

prior to or at the hearing before the ALJ. However, Plaintiff never raised a possible mental disorder. Plaintiff suggests that the ALJ has a duty to address and develop an issue which Plaintiff has never raised.

In numerous applications for disability, Plaintiff has listed muscle spasms, back pain (and accompanying leg, hip, knee pain), arthritis, and scoliosis. [R. at 62, 68, 79, 119, 133, 143, 510, 544]. During two hearings before two different administrative law judges, Plaintiff mentioned scoliosis, arthritis, whiplash, cysts, back pain, muscle spasms, hip pain, knee pain, foot pain, pain in her spine, [R. at 31-34, 39, 41, 488-496]. Plaintiff was represented by counsel in each of her hearings before administrative law judges. Plaintiff never raised the issue of a mental impairment or depression.

Plaintiff's record contains very little with respect to a potential mental impairment. On June 29, 1987, Plaintiff was reported as appearing neat and clean, being "oriented times three," and as having normal intelligence. [R. at 177]. On July 30, 1987, Plaintiff was reported as very depressed. [R. at 185]. On May 16, 1989, one doctor noted that Plaintiff's older brother had had his legs amputated and that this event may have had an affect on Plaintiff's perception of pain. [R. at 212]. On September 26, 1991, a doctor noted that "[m]ay well be that it is purely a chronic anxiety depressive reaction with sematitization of all of her complaints and frustrations." He noted that he would review a CT of her abdomen and back, but that if those were normal "she is going to have to live with her problem and adjust

accordingly." [R. at 570.] Plaintiff suggests that this last notation by the doctor is sufficient to require the ALJ to do a complete evaluation of Plaintiff's mental disorder.

Plaintiff never raised the issue of a mental disorder as a cause for her disability. The limited reference to "sematization" and depression contained in this record are simply insufficient to have required the ALJ to fully develop the record with respect to this issue. The Court concludes that, under the facts of this case, the ALJ did not err by failing to more fully develop the record with respect to Plaintiff's mental condition. See, e.g., Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994) ("We agree with Ms. Glass that every ALJ has 'a basic obligation . . . to ensure that an adequate record is developed during the disability hearing consistent with the issues raised.' This duty is not a panacea for claimants, however, which requires reversal in any matter where the ALJ fails to exhaust every potential line of questioning.") citations omitted.

Plaintiff additionally asserts that the ALJ erred by failing to complete and attach a Psychiatric Review Technique Form ("PRT") to the ALJ's decision. However, because the Court concludes that the ALJ did not have a duty to develop this issue, the Court additionally concludes that the ALJ was not required to attach a PRT to his decision.

Evaluation of Plaintiff's Credibility - Pain Analysis

Plaintiff asserts that the ALJ failed to properly consider her pain and limited mobility in his determination that she was not disabled.[6/]

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

> [I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

> [T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of

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6/ Defendant argues that the medical findings do not support Plaintiff's claims and that the ALJ evaluated Plaintiff's pain including Plaintiff's use of medication, her functional restrictions, and the objective indicators of pain. Defendant is referring, however, to the 1991 ALJ decision which is not the decision which was appealed by Plaintiff.

> and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

In Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions.

> Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id.

Under Luna, the ALJ first evaluates the medical record to determine whether a claimant who is alleging pain has an impairment supported by objective, and whether a nexus exists between the impairment and the alleged pain. After determining that

the claimant has an impairment which could produce the alleged pain about which the claimant complains, the ALJ then evaluates the claimant's credibility.

The ALJ, in this case, does not clearly follow Luna. The ALJ discusses, very briefly, Plaintiff's testimony and her credibility. The ALJ then states that "[o]bservations of treating and examining physicians and objective test results have not revealed 'disabling' functional restrictions imposed by pain or other symptoms. The evidence is lacking for signs and findings one might consider 'disabling.'" [R. at 477]. Arguably, the ALJ could be suggesting that the appropriate "nexus" does not exist. However, the ALJ's opinion is simply not clear. In addition, the ALJ seems to briefly discuss Plaintiff's credibility. If no nexus exists, an evaluation of credibility is not necessary. Regardless, the Court finds that the ALJ's discussion is simply not sufficient to permit a conclusion that the ALJ found that no nexus was present.

Assuming the presence of a nexus, the ALJ is required to evaluate Plaintiff's credibility under Luna and Kepler. The ALJ noted only that Plaintiff's daily activities were not inconsistent with the performance of substantial gainful activity[7/] and that Plaintiff reported taking no medication as of March 14, 1995.[8/] [R. at 477]. The

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[7/] Plaintiff's testimony of her "daily activities" includes several naps during the day, doing some light cooking when she is up to it, doing light household chores, and limited driving. Plaintiff testified at her first hearing that she tries to ride her exercise bicycle for five minutes at a time four or five times each day. Plaintiff initially stated that she fished on occasion, but by the time of her second hearing, Plaintiff noted that she was unable to fish. These activities, alone, are not sufficient to equate to substantial gainful activity.

[8/] Plaintiff acknowledged that she was unable, at numerous times, to take medications for her pain due to her lack of money. The ALJ does not explore Plaintiff's explanation for the failure to take medications.

Court finds that the ALJ's discussion of Plaintiff's credibility is inadequate under the applicable law.[9/]

RFC Evaluation

Plaintiff argues that the record contains no support for the ALJ's conclusion that Plaintiff can perform light work.[10/] Plaintiff references Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993).

An RFC Assessment on March 1, 1994 noted that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand for six hours, and sit for six hours. [R. at 530]. The Assessment was affirmed as written on April 20, 1994. Plaintiff was examined on February 7, 1994. The doctor noted that when Plaintiff did not know she

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9/ Evaluation of credibility is solely a factor for the trier of fact -- the ALJ. The Court notes, however, that the record contains numerous potential areas of inquiry for the ALJ. For example, Plaintiff stated that she did not take medications due to her lack of money. However, at the hearing before the ALJ Plaintiff had stopped taking food stamps because her husband had earned some additional money and she did not want to rely on food stamps. [R. at 502]. If Plaintiff truly needed the medications, perhaps the additional money could have gone to the medications. Plaintiff testified and noted, throughout the record, that numerous doctors had restricted her to bed rest. [R. at 146, 151]. However, the record does not support Plaintiff's claim. Plaintiff additionally testified and noted that she was unable to obtain the treatment she needed due to inadequate finances. The record contains at least one letter by a health care provider that Plaintiff was never denied treatment due to inadequate finances. [R. at 271, 278]. Plaintiff testified at the hearing that she was unable to write a letter by herself. The record contains numerous detailed letters which purport to be written by Plaintiff. [R. at 95-96, 552, 556]. Plaintiff noted several times that she had been turned down by a potential rehabilitation program because the rehabilitation program expected that after completion of the program she should seek work. Plaintiff testified that she was unable to sit for more than 15 minutes although her attorney pointed out during the hearing that she had already been sitting for at least that long. [R. at 494-96]. Plaintiff testified that she drove approximately four times each week. [R. at 498]. In her disability report dated December 17, 1993, Plaintiff noted that she did not drive her car except in emergencies. [R. at 547].

10/ Defendant suggests that Plaintiff "misstates the ALJ's decision" because Plaintiff argues that the ALJ concluded Plaintiff could perform light work and this conclusion is not supported by the record. Defendant states that the ALJ found that Plaintiff could perform only sedentary work. Defendant is referring to an earlier decision of the ALJ. On May 16, 1991, ALJ John M. Slater found that Plaintiff was not disabled and could do sedentary work. On May 23, 1995, ALJ Ralph L. Wampler decided that Plaintiff was not disabled and could do light work. Plaintiff appeals from the May 1995 decision. Defendant mistakenly refers only to the 1991 decision.

was being observed she walked with a stable gait. In addition, Plaintiff showed no deformities, no redness, no swelling, and no tenderness. [R. at 603]. The doctor halted the examination because he believed Plaintiff was not trying. [R. at 605]. The examiner noted that when he observed Plaintiff leaving the examination she sat in the front seat of the automobile without assistance and without difficulty, and managed to shift her position with no problem. [R. at 605]. Absent the ALJ's failure to properly evaluate Plaintiff's complaints of pain, the record contains support for the ALJ's finding that Plaintiff can perform the demands of light work.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 25 day of February 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HAMILTON HALLMARK, a division of AVNET, INC., a New York corporation,

Plaintiff,

vs.

NATIONAL COMPUTERS PLUS, INC., an Oklahoma corporation,

Defendant.

Case No. 97-CV-824B (J)

JUDGMENT

Pursuant to this Court's express direction in its Order Granting Plaintiff's Motion for Partial Judgment on the Pleadings filed February 23, 1998 herein, final Judgment is hereby granted in favor of Plaintiff Hamilton Hallmark, a division of AVNET, Inc., and against Defendant National Computers Plus, Inc., on Count I of Plaintiff's Complaint in the principal amount of $499,715.46, plus pre-judgment interest in the amount of $106,747.88 accrued through February 20, 1998, for a grand total of $606,463.34.

Post-judgment interest will accrue thereon at the rate of 5.32% per annum in accordance with 28 U.S.C. § 1961.

HON. THOMAS R. BRETT
United States District Judge

SUBMITTED BY:

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NATIONAL COMPUTERS PLUS, INC.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JORDAN F. MILLER CORPORATION, a California corporation,

Plaintiff,

vs.

MID-CONTINENT AIRCRAFT SERVICE, INC., an Oklahoma corporation, JET CENTER TULSA, INC., an Oklahoma corporation,

Defendants.

Case No. 95-C-469-B

JUDGMENT

In accordance with the jury verdict rendered on February 25, 1998, Judgment is hereby entered as follows: in favor of Plaintiff Jordan F. Miller Corporation on its claims against Defendant Jet Center Tulsa, Inc. in the amount of $25,000.00 and against Defendant Mid-Continent Aircraft Services, Inc. in the amount of $20,500.00; in favor of Defendant Jet Center Tulsa, Inc. on its counterclaim against Plaintiff Jordan F. Miller Corporation in the amount of $10,000.00; and in favor of Defendant Mid-Continent Aircraft Services, Inc. on its counterclaim in the amount of $5,909.27. Pursuant to 28 U.S.C. §1961, each award will accrue post-judgment interest at the rate of 5.232% per annum from February 26, 1998, the date of judgment, until paid.

If either party intends to make a claim for costs or attorneys' fees herein, such should be timely made in accordance with Local Rules 54.1 and 54.2

DATED this 26th day of February, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT COWAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 97-CV-1124-B**
	)	
UNITED STATES OF AMERICA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, and THE FOOD AND DRUG ADMINISTRATION,	)	
	)	
Defendants.	)	

DISMISSAL

COMES NOW the Plaintiff, Robert Cowan, and dismisses the above-captioned case without prejudice.

The Defendants have no objection.

Jeff Nix, OBA # 6688
Armstrong, Nix & Lowe
1401 South Cheyenne
Tulsa, Oklahoma 74119
(918) 742-4486

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 26 day of February, 1998, a true and correct copy of the above and foregoing document was mailed with proper postage prepaid thereon to:

Peter Bernhardt
U.S. Attorney's Office
333 W. 4th St.
3rd Floor
Tulsa, OK 74103

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE FEB 27 1998

MELANIE I. ALLISON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 98-CV-0008-E (J)**
	)	
LEADERS LIFE INSURANCE CO., an Oklahoma insurance company, and AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS (AFLAC), a foreign insurance company, and JUDY ROBB, an individual,	)	
	)	
Defendants.	)	

FILED

FEB 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF DEFENDANT, AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS (AFLAC), A FOREIGN INSURANCE COMPANY

Plaintiff, MELANIE I. ALLISON, and Defendant, AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS (AFLAC) a foreign insurance company, file this Stipulation of Dismissal under Fed.R.Civ.P. 41(a)(1)(ii).

1. Plaintiff sued Defendant, AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS (AFLAC), a foreign insurance company, on the 13th day of August, 1997.

2. Plaintiff moves to dismiss the suit against the Defendant, AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS (AFLAC), a foreign insurance company.

3. Defendant, AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS (AFLAC), a foreign insurance company, which has filed a motion to dismiss, agrees to the dismissal.

4. This case is not a class action, and a receiver has not been appointed.

5. This action is not governed by any statute of the United States that requires an order of the Court for dismissal of this case.

6. Plaintiff has not dismissed an action based on or including the same claim or claims as those presented in this suit.

7. This dismissal is without prejudice.

Respectfully submitted,

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Attorneys for Defendant, AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS (AFLAC), a foreign insurance company

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiff certifies that a true and correct copy of the foregoing STIPULATION OF DISMISSAL WITHOUT PREJUDICE OF DEFENDANT, AMERICAN FAMILY LIFE ASSURANCE CO. OF COLUMBUS (AFLAC), A FOREIGN INSURANCE COMPANY, was served by mail, postage prepaid, this 25TH day of February, 1998, upon the following:

Attorneys for Defendant,
AMERICAN FAMILY LIFE ASSURANCE
CO. OF COLUMBUS (AFLAC), a foreign
insurance company:

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Timothy P. Clancy

csg W:\Cindy\Allison\dismiss.stip.aflac.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON, individually and as Personal Representative of the Estate of ANNE E.HUTCHINSON, deceased,

Plaintiff,

vs.

RICHARD B. PFEIL; MARY JOAN PFEIL; ART SERVICES INTERNATIONAL, INC.; WILLIAM H. GERDTS; DAVID BERNARD DEARINGER; SONA JOHNSTON; and SOUTH CHINA PRINTING COMPANY,

Defendants.

Case No. 94-C-711-E

O R D E R

Now before the Court is the Motion of Defendants for Entry of Final Judgment with Respect to Judgment Entered on August 1, 1995, or For Entry of Judgment for South China Printing Company and Memorandum in Support Thereof (Docket #138), the Defendant Sona Johnston's Motion for Entry of Final Judgment or Entry of Judgment in Favor of South China Printing (Docket #141), the Petition of Hope Cobb for an Order Permitting Her to Intervene and Assert a False Advertising Claim and Brief in Support of Petition for Intervention (Docket #151), Plaintiff's Motion to Substitute Thomas R. Hutchinson for the Estate of Anne E. Hutchinson, Deceased; to Join Additional Parties; to File Third Amended Complaint; and to Amend Caption of Case (Docket # 166); Plaintiff's Motion for Permanent Injunction (Docket #171) and Defendant Sona Johnston's Motion to Strike Plaintiff's Motion for Permanent Injection (Docket #178).

This action began as a Lanham Act claim based on Plaintiff's

belief that Defendants' have made misrepresentations concerning the "E.M.J. Betty," painted by Theodore Robinson and owned by the Pfeils. Plaintiff claims that there is more than one "E.M.J. Betty," that they are the rightful owners of the real "E.M.J. Betty," and that they are damaged by the misrepresentations concerning the other "E.M.J. Betty." Plaintiff admits that he is not in possession of the real "E.M.J. Betty," and does not know where it is located.

All Defendants, except South China Printing Company, who has not answered, moved for summary judgment. On August 1, 1995, the Court granted summary judgment in favor of the Defendants, finding that Plaintiff has no standing to bring suit under the Lanham Act because he cannot show that he has been or is likely to be damaged because he has never seen the "real E.M.J. Betty" and does not know who is in possession of the "real E.M.J. Betty." Plaintiff filed a Motion to Alter the Order Granting Summary Judgment, arguing that it was incorrect as a matter of law. That motion was considered and denied by this Court. After the Court granted summary judgment on the only pending claim, and almost two years after the original Complaint was filed, Plaintiff filed a Petition for Leave to Join Additional Parties and File a Second Amended Complaint. The primary purpose of this motion was to add a claim of negligent misrepresentation. Based on the procedural posture of the case, where the only pending claim had been disposed of, and the unexplained delay in requesting to amend, the Court denied the request to file a second amended complaint.

At this same time, plaintiff filed an interlocutory appeal of what he termed the Court's non-final judgment because of the failure to include South China Printing Company. The Court of Appeals dismissed the appeal for lack of jurisdiction, but noted:

> The district court ruled against Hutchinson below on the grounds that he lacked standing to pursue claims under the Lanham Act. Assuming that Hutchinson's claims against South China are similar to those pursued against the appearing defendants, that ruling would appear to have equal applicability to South China. Assuming that to be the case, now that we have dismissed this appeal, it seems to us that the most efficient approach to resolve this litigation is for the district court to enter judgment as to South China on the same basis that was entered for the other defendants. [citations omitted] At that point, all the parties will have a final judgment, and a proper appeal may be taken to this court.

During the pendency of the appeal, plaintiff's counsel filed the Petition of Hope Cobb for an Order Permitting her to Intervene and Asset a False Advertising Claim and Brief in Support of Petition for Intervention. Hope Cobb claims that the provenance which the Pfeils attribute to their unfinished "E.M.J. Betty" actually belongs to a watercolor that she owns. After the appeal was dismissed, plaintiff filed another Motion to Substitute Thomas R. Hutchinson for the Estate of Anne E. Hutchinson, deceased, To Join Additional Parties; to File Third Amended Complaint; and to Amend Caption of Case. The Motion to Substitute is slightly different from the original one. The Motion to Join Additional Parties and File Third Amended Complaint is substantially the same as the Motion to Join Additional Parties and File Second Amended Complaint that was previously denied by this Court. As with the Motion to File Second

amended complaint, plaintiff seeks to add a claim for negligent misrepresentation. Also after the appeal was dismissed, the plaintiff filed a Motion for Permanent Injunction[1] which is essentially another motion for reconsideration of the Court's original Order granting summary judgment on the issue of standing.

Motion for Judgment in Favor of South China Printing

Because a concern over the non-finality of the Order granting Summary Judgment, after Plaintiff filed a Notice of Appeal, Defendants filed motions requesting either that the Court enter Final judgment, determining that there is no just reason for delay, or that the Court enter Judgment in favor of South China Printing Company. Plaintiff argued that the Court was without jurisdiction to do either of the things requested by Defendants because of the Notice of Appeal. Accordingly, this Court did not Amend the Judgment or enter Judgment against South China Printing.

In dismissing the appeal for lack of jurisdiction, the Court

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[1] The argument included in the so-called "Motion for Permanent Injunction" demonstrates the true nature of Plaintiff's motion. Far from supporting a motion for permanent injunction, the argument in plaintiff's brief has the following headings: Defendants failed to establish that Hutchinson has no claim under Section 43(a)(1) of the Lanham Act as a matter of law; Two of Hutchinson's theories of liability were not addressed by defendants or the Court in its August 1, 1995 Order; Hutchinson need not be a competitor of the Pfeils or allege a competitive injury in order to have standing to assert his false association claim; Hutchinson's intangible interests in "The E.M.J. Betty" cannot be protected unless the Court finds that he has standing to seek an injunction to prevent continued use of a plagiarized title for the Pfeil E.M.J. Betty"; The Court should find, on reconsideration of its prior ruling, that Hutchinson has standing to assert his "false advertising claim"; Elements of a "false advertising" claim are sufficiently alleged in the Amended Complaint and supported by record evidence to establish Hutchinson's standing; Hutchinson has suffered an Article III "injury in fact"; There is a causal connection between the injury and the conduct complained of; It is likely that the alleged injuries will be redressed by a favorable decision; Proof that defendants' descriptions and representations of fact are literally false will sustain a finding of "irreparable injury" sufficient to support issuance of an injunction.

of Appeals noted that this Court could enter judgment for South China Printing on the same basis as it entered judgment in favor of the other defendants. Notably, Plaintiff has never objected to this approach other than to assert that this Court could not do so while the matter was on appeal. Since the matter has been remanded, and a review of the Amended Complaint reveals that the claim against South China Printing is identical to that against other Defendants, the Court finds that judgment is appropriate in favor of South China Printing because Plaintiff does not have standing to pursue his Lanham Act claim. The Motions for Judgment are granted.

Motion to Intervene on Behalf of Hope Cobb

Hope Cobb seeks to intervene as a matter of right, arguing that plaintiff may represent her interests inadequately and that disposition of the action will impair her ability to protect her interest. Kiamichi R. V. National Mediation Board, 986 F.2d 1341, 1345 (10th Cir. 1993). She claims to have "a direct, substantial, legally protectable interest in the [pending] proceedings." Hobson v. Hansen, 44 F.R.D. 18. 24 (D.D.C. 1968). Cobb supports her request with the assertion that "[b]y seeking summary judgment in Case No. 94-C-1134-E the Pfeils have asked this Court to determine, as a matter of law, that the provenance which, in fact, establishes that Hope Cobb has valid title to the watercolor in her possession belongs, instead, to the Pfeils' unfinished "E.M.J. Betty."

Cobb's argument, at best, supports a request for intervention in Case No. 94-C-1134-E. Her motion, however, must be analyzed in

light of the current procedural posture of **this** case. This case has been dismissed because of the plaintiff's lack of standing. There is no further decision that can be made which would "impair [Hope Cobb's] ability to protect [her] interest." Because of the current posture of this case, intervention would neither foster judicial economy nor protect her interest from being litigated in a proceeding in which she is not participating. Cobb's Motion to Intervene is Denied.

Motion to Substitute, Add Parties, and File Amended Complaint

This motion is, in substance identical to the one denied by the Court on November 9, 1995. Plaintiff seeks to add parties and file an Amended Complaint adding a claim for negligent misrepresentation. Plaintiff asserts that the Court's previous denial of the Motion to Amend should be revisited because its reason for denying the motion, previous entry of a final judgment, no longer exists since the Court of Appeals held that the judgment was not final.

The standard regarding a Motion to Amend was set out by the Court in Foman v. Davis, 371 U.S. 227, 83 S.Ct. 226 (1962):

> Rule 15(a) declares that leave to amend `shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc., the leave sought should, as the rules require, be `freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but

> outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

In this instance, the Court finds, as it did in 1995, that amendment is not appropriate at this time. Undue delay, and the current posture of the case, where summary judgment has been granted in favor of all appearing defendants all dictate a denial of the motion. The Court is particularly mindful that the underlying facts supporting the claim for negligent misrepresentation are the same facts that supported the Lanham Act claim. There was nothing to prevent the plaintiff from bringing the negligent misrepresentation claim prior to the grant of summary judgment, or for that matter, at the time of filing the Complaint. The Motion to File Third Amended Complaint is denied, accordingly the Motions to Substitute Parties, Add Parties, and Amend the Caption are denied as moot.

Motion for Permanent Injunction

Plaintiff also seeks a permanent injunction regarding the Pfeils' use of the provenance for their "E.M.J. Betty." In seeking this permanent injunction plaintiff argues that the Court erred in its granting of the Motion for Summary Judgment and in ignoring theories that were advanced by the plaintiff it his Complaint. A thorough review of the record of this case, including the amended complaint and the transcript of the hearing on the motions, reveals that the record is devoid of any position taken by plaintiff that there is a claim other than a false advertising claim under the

Lanham Act. To attempt to give the amended complaint an interpretation at this late date that has not been attempted before is, at best, inappropriate. Because Plaintiff has no cognizable Lanham Act claim currently before this Court, there is no basis for Plaintiff's Motion for Permanent Injunction.

Conclusion

The Motion of Defendants for Entry of Final Judgment with Respect to Judgment Entered on August 1, 1995, or For Entry of Judgment for South China Printing Company and Memorandum in Support Thereof (Docket #138), and the Defendant Sona Johnston's Motion for Entry of Final Judgment or Entry of Judgment in Favor of South China Printing (Docket #141) are **granted in part and denied in part**. The Court hereby enters judgment in favor of South China Printing Company and against Plaintiff on the Lanham Act claim for lack of standing. The Petition of Hope Cobb for an Order Permitting Her to Intervene and Assert a False Advertising Claim and Brief in Support of Petition for Intervention (Docket #151) **is denied**. Plaintiff's Motion to Substitute Thomas R. Hutchinson for the Estate of Anne E. Hutchinson, Deceased; to Join Additional Parties; to File Third Amended Complaint; and to Amend Caption of Case (Docket # 166)**is denied.** Plaintiff's Motion for Permanent Injunction (Docket #171) **is denied.** Defendant Sona Johnston's Motion to Strike Plaintiff's Motion for Permanent Injection (Docket #178) **is denied as moot**.

In light of these rulings, the Application for Status conference (Docket #159), the Supplemental Application for Status

conference (Docket #162), the Motion for Scheduling/Case Management Conference (Docket #163), the Request of Plaintiffs and Hope Cobb that the Court take Judicial Notice of their Constitutionally Protected Right of Access to the Court Before It Rules on Pending Motions (Docket #165), and the Request for Evidentiary Hearing on Plaintiff's Motion for Permanent Injunction (Docket #170) are all **moot**.

The Application for Attorneys' Fees and Costs to be Assessed Against Plaintiffs and Their Counsel (Docket #109), the Application for Attorney fees (Docket #111), the Defendants' Motion for Assessment of Sanctions Pursuant to Rule 11 (Docket #118) and Defendant Sona Johnston's Motion for Assessment of Sanctions Pursuant to Rule 11 (Docket # 133) are all **stayed** pending the appeal of the Court's August 1, 1995 Order.

In light of the fact that the issues raised in the above-discussed motions have, for the most part been previously considered by this Court, and that the primary issue in this case, that of standing of the plaintiff to bring this claim, have already been briefed before the Court of Appeals, the Court directs all parties to not file any additional pleadings in this case without first obtaining leave of Court.

IT IS SO ORDERED THIS 26th DAY OF FEBRUARY, 1998.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

UNITED VAN LINES, INC., a corporation,

Plaintiff,

vs.

Case No. 97CV1094K

SMI CORP., d/b/a TECH DEVELOPMENT, an Oklahoma corporation; TECH DEVELOPMENT CORP., an Oklahoma corporation; CAROLINA COMPUTER REFURBISHING, a corporation; PROSERVICE COMPUTER MARKETING, INC., a corporation; KONICA BUSINESS MACHINES, a corporation; LTV STEEL, a corporation; ALCOA, a corporation; MPW INDUSTRIAL SERVICES, a corporation; CENTERBANK, a corporation; and BAY BANK BOSTON, a corporation,

Defendants.

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, United Van Lines, Inc., by and through its attorney of record, David B. Schneider, and dismisses the above-referenced matter. Defendants have not filed an Answer.

Respectfully submitted,

By: _____

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ATTORNEY FOR PLAINTIFF
UNITED VAN LINES, INC.

mail
C/J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAREN PETERS,

Plaintiff,

vs.

AMERICAN INCOME LIFE INSURANCE COMPANY, a corporation; DAVID E.DWYER,

Defendants.

Case No. 97-CV-1111-B

O R D E R

Before the Court is Plaintiff Karen Peter's Motion to Remand, (Docket #4), and the Court, being fully advised, finds the same should be granted.

Defendant American Income Life Insurance Company ("American") removed this case from the District Court of Tulsa County, Oklahoma, on December 17, 1997, alleging that Oklahoma resident defendant David E. Dwyer ("Dwyer") was fraudulently joined in that no cause of action was stated against him. Based upon this assertion, American urges his joinder cannot defeat diversity jurisdiction.

Plaintiff moved to remand on the primary ground that her Petition alleges and states a valid cause of action or claim upon which relief can be granted against Dwyer, individually and personally, and that his joinder is not fraudulent. Plaintiff refers the Court to a 1978 decision from the western district of Oklahoma, Town of Freedom, Oklahoma v. Muskogee Bridge Co., Inc., et.al., 466 F. Supp. 75 (W.D. Okl.1978) to support

remand. Defendants response brief agrees that this case sets forth the applicable standard for determining whether joinder of a non diverse defendant is fraudulent. Further, defendants do not dispute plaintiff's statement of undisputed facts. This Court must therefore determine if the defendant has established that the plaintiff has failed to state (and seemingly cannot state) a cause of action against the resident defendant under Oklahoma substantive law.

The allegations in the Petition against Dwyer are, in summary, that Dwyer, while acting as an agent of American forged the signature of Reba J. Deason, the now deceased mother of plaintiff, on an alleged application for a replacement policy of life insurance under policy no. 5377837. Based upon the alleged replacement policy, American denied plaintiff's claims for payment of life insurance under two original policies. Dwyer was not the agent who wrote these policies. A further allegation is that Americans denial of plaintiff's claims constitutes deliberate, intentional, malicious, and outrageous bad faith breaches of the contracts of policies of insurance and of the defendants' fiduciary duties of good faith and fair dealing.

Plaintiff cites and attaches the recent case of Cox v. Kansas City Life Insurance, 68 OBJ 3333 (Okla. 1997) in support of having stated a cause of action against Dwyer individually. While it is clear in Cox that a judgement was taken against an insurance agent individually, the agent did not appear at trial to contest the allegations against him by either the plaintiffs or Kansas City Life Insurance, which counterclaimed against the

agent. No history of the case is given to indicate whether the District Court of Woods County addressed at any point in the proceedings whether the agent was properly before the court. Rather, the court's entry of a directed verdict for the tort of outrage and for liability against the agent was in the nature of a default judgment. Further, we are not privy to the specific allegations or proof raised against him. This Court must therefore decline to extend the holding of Cox so far as urged by plaintiff. This Court can determine that the counterclaims raised against the agent consisted of tortious conduct, i.e., fraud, conversion, and embezzlement, which would normally be sufficient to establish that the agent was acting outside the scope of his employment. The applicability of Cox to this case primarily rests there. In what appears to be dicta, the Cox court restated the basic principle that Oklahoma law allows a plaintiff to obtain separate judgments against a principal and agent, although the principal's liability is based solely on the agent's acts. See In Re Brown, 412 F.Supp. 1066 (W.D.Okla.1975).

Defendant urges that plaintiff has failed to assert a claim against Dwyer because he is not a party to the two contracts on which plaintiff seeks to recover in this action and that plaintiff cannot assert a bad faith claim against Dwyer under Oklahoma law. The issue of whether a bad faith claim can be maintained against an agent need not be reached by this Court because the Court finds that plaintiff's allegations are sufficient to state a claim under Oklahoma notice pleading against Dwyer. If this plaintiff is in fact able to establish

that Dwyer forged the signature of plaintiff's mother on a policy application which effectively allowed American to decline coverage under the two policies which are the subject of this litigation, plaintiff has been damaged by his actions and may proceed against him in this case.

Defendant American has failed to establish fraudulent joinder by clear and convincing evidence as required under the holdings of this circuit. See McLeod v.Cities Service Gas Co.,233 F.2d 242 (10th Cir. 1956). Accordingly, Plaintiff Karen Peter's Motion For Remand is sustained and the Court remands this case to the State District Court of Tulsa County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

IT IS SO ORDERED THIS 24th DAY OF FEBRUARY, 1998.

THE HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TULSA EXPEDITING, INC., an Oklahoma corporation,	
Plaintiff,	
v.	**Case No. 96-CV-1111-B**
FREIGHTLINER CORPORATION, an Indiana corporation, and CUMMINS ENGINE COMPANY, INC., a Delaware corporation,	
Defendants,	
and	
CUMMINS ENGINE COMPANY, INC., a Delaware corporation,	
Third Party Plaintiff,	
v.	
ROBERT BOSCH CORPORATION a Delaware corporation, and USUI INTERNATIONAL CORPORATION, a Michigan corporation,	
Third Party Defendants.	

ORDER

On this 24 day of Feb., 1998, this matter comes before the Court on the Application of Defendant and Third Party Plaintiff, Cummins Engine Company, Inc., to dismiss with prejudice its crossclaim against Freightliner Corporation and Application of Defendant Freightliner Corporation to dismiss with prejudice its crossclaim against Cummins

Engine Company. The Court notes that all parties to this action agree to this Application. The Court, being fully advised, finds that the Application of Cummins Engine and Freightliner Corporation should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Cummins Engine Company, Inc.'s crossclaim against Freightliner Corporation and Freightliner Corporation's crossclaim against Cummins Engine Company are dismissed from this action with prejudice.

IT IS SO ORDERED.

DATED this 24 day of Feb., 1998.

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 24 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TULSA EXPEDITING, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
v.	)	**Case No. 96-CV-1111-B**
FREIGHTLINER CORPORATION, an Indiana corporation, and CUMMINS ENGINE COMPANY, INC., a Delaware corporation,	)	
Defendants,	)	
and	)	
CUMMINS ENGINE COMPANY, INC., a Delaware corporation,	)	
Third Party Plaintiff,	)	
v.	)	
ROBERT BOSCH CORPORATION a Delaware corporation, and USUI INTERNATIONAL CORPORATION, a Michigan corporation,	)	
Third Party Defendants.	)	

ORDER

On this 24 day of Feb, 1998, this matter comes before the Court on the Application of Plaintiff, Tulsa Expediting, Inc., to dismiss with prejudice Cummins Engine Company, Freightliner Corporation, Robert Bosch Corporation and Usui International Corporation, and Application of Third Party Plaintiff, Cummins Engine Company, to dismiss with

prejudice Robert Bosch Corporation and Usui International Corporation. The Court notes that all parties to this action agree to this Application. The Court, being fully advised, finds that the Application of Plaintiff, Tulsa Expediting, Inc., and Third Party Plaintiff, Cummins Engine Company, Inc., should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Cummins Engine Company, Freightliner Corporation, Usui International Corporation and Robert Bosch Corporation are dismissed with prejudice as to any and all claims brought by the Plaintiff, Tulsa Expediting, Inc. and Robert Bosch Corporation and Usui International Corporation are dismissed with prejudice as to any and all claims brought by Third Party Plaintiff, Cummins Engine Company,

IT IS SO ORDERED.

DATED this 24 day of Feb., 1998.

THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 24 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AARON HEBBEN)
)
Plaintiff)
vs.) Case No. 95-CV-1194-HB
)
SHERIFF STANLEY GLANZ,)
)
Defendants)

ENTERED ON DOCKET
DATE FEB 26 1998

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 24th day of February, 1998

Thomas R. Brett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOARD OF TRUSTEES OF RESILIENT FLOOR COVERERS LOCAL #1533 PENSION PLAN and MARLIN HEIM, Plan Administrator,	)	
Plaintiffs,	)	
vs.	)	Case No. 97-CV-338-E (M)
HOWARD CAVANESS, et al.	)	
Defendants.	)	

ORDER OF DISMISSAL WITHOUT PREJUDICE AS AGAINST DEFENDANT ROBERT E. RUBIN ONLY

NOW on this 24th day of February, 1998, the Stipulation of Dismissal Without Prejudice as Against Defendant Robert E. Rubin filed herein pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure comes on before me, the undersigned Judge of the United States District Court.

The Court finds that the above-captioned cause should be dismissed without prejudice as against Defendant Robert E. Rubin only.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-captioned cause be and the same is hereby dismissed without prejudice as against Defendant Robert E. Rubin only.

UNITED STATES DISTRICT COURT

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APPROVED AS TO FORM:

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STEPHEN C. LEWIS
United States Attorney

Attorney for Defendant, Robert E. Rubin, Internal Revenue Service

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 97-CV-561-K(J)**
	)	
THE SUM OF SEVEN THOUSAND ONE HUNDRED SIXTY-SIX DOLLARS ($7,166.00) IN UNITED STATES CURRENCY,	)	
	)	
Defendant.	)	

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of February 25, 1998, and the Declaration of Assistant United States Attorney Catherine Depew Hart, that all parties in interest, if any, to the defendant United States Currency, against whom judgment for affirmative relief is sought in this action, have failed to plead or otherwise defend, as provided by the Federal Rules of Civil Procedure;

NOW, THEREFORE, I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of the defendant United States Currency as to all persons and entities.

DATED at Tulsa, Oklahoma, this 25 day of February, 1998.

PHIL LOMBARDI
Clerk, U. S. District Court

by: S Schreiber

N:\UDD\LPEADEN\FORFEITU\HART\DEFAULT.CLK

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	ENTERED ON DOCKET DATE FEB 26 1998
Plaintiff,	)	
vs.	)	
KAREN ALEXANDER MOORE,	)	
Defendant.	) Civil No. 97CV833BU(W)	

FILED
FEB 26 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action with prejudice.

Dated this 26th day of February, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of February, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Karen Alexander Moore, 808 W. Utica, Broken Arrow, OK 74011.

Loretta F. Radford
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA CERVANTES,
SSN: 444-46-1771,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security Administration,

Defendant.

CASE NO. 96-CV-679-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 25th day of Feb., 1998.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(17)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINDA CERVANTES

444-46-1771 Plaintiff,

vs.

KENNETH S. APFEL,[1]
Commissioner,
Social Security Administration,

Defendant.

Case No. 96-CV-679-M

ORDER

Plaintiff. Linda Cervantes, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.[2] In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26

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[1] Kenneth S.. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

[2] Plaintiff's August 19, 1994 application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held April 26, 1995. By decision dated May 22, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 22, 1995. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services,* 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born February 12, 1945, and was 46 years old at the time of the hearing. She has a 12th grade education and has formerly worked in telephone sales, as a carpet cleaner and a cook. She claims to be unable to work as a result of cervical disc disease, bilateral carpel tunnel syndrome, and depression. She reportedly slipped on a grape while shopping at Wal-Mart, lost consciousness in her fall and since that time, June 12, 1994, has been unable to work.

X-rays taken at the time of her fall revealed a possible fracture at the C-2 level. [R. 99]. A pelvic x-ray revealed fusion of the pubic symphysis which could be related to remote trauma, but no acute fracture or dislocation was present. [R. 100]. In August 1994, neurologist, Samuel H. Park, M.D., stated that clinically, he believed Plaintiff had cervical disc disease at the C5-C6 level. [R. 112]. This was confirmed by an MRI, also conducted in August 1994. [R. 116]. In January 1995 Plaintiff was

examined by orthopedic surgeon, Mark A. Hayes, M.D., who observed some weakness of the wrist extensor and wrist flexor, some diminished sensation of pain over the long finger on the left, and complaints of pain in what appeared to be a C6 nerve root distribution. Dr. Hayes recommended further testing, myelogram and CT before considering further treatment, including possible surgery. [R. 136-37]. No further testing was performed or sought by Plaintiff.

Plaintiff was also diagnosed as having bilateral carpel tunnel syndrome, unrelated to her accident. [R. 112]. Use of a cock-up splint was prescribed for this condition. However, Plaintiff has never obtained the splint, citing lack of funds as the reason.

There are no medical records specifically addressing any complaints of depression; on one occasion an antidepressant, Endep, was prescribed. [R. 119]. Depression is only mentioned in the portion of the record related to the reconsideration review. On her reconsideration disability report, Plaintiff described depression as being among her symptoms. On a medical consultant review form the following is written in the space for case analysis:

> 49 yr old woman who alleges depression secondary to the trauma of her accident and subsequent inability to do former activity. She has a history of alcohol abuse and is involved with AA. Says she had 10 years of sobriety. No other treatment for alcohol abuse. No treatment for depression. Says it doesn't contribute to her disability. Do we need a MSE.

[R. 58]. A psychiatric review technique form ("PRT") was completed in which an affective disorder consisting of "situational depression secondary to physical

condition" was found to be present. [R. 52]. The reviewer checked that the following were present: a slight degree of limitation with respect to restriction of activities of daily living; a slight degree of limitation in maintaining social functioning; and deficiencies of concentration, persistence or pace seldom occurred. [R. 56]. It is not clear where the information for completion of this form came from because there is no mention of depression in the medical records.

At the hearing, Plaintiff testified that she could not work because of pain in her neck, down her arms and in her chest. She also stated that she had trouble walking because her pelvis was fused together. [R. 155]. She has trouble with her hands, drops things a lot, and can't bend one of her thumbs. [R. 158-9].

The ALJ posed a hypothetical question to the vocational expert, asking him to assume the physical capacity to perform work at the light exertional level with the additional limitation of being unable to engage in prolonged walking and standing, and performance of the lifting requirements of light work on an infrequent basis so as to be limited to the low range of light work, reduced grip strength bilaterally affecting the left more than right, and right hand dominance. [R. 170-71]. The vocational expert identified a number of jobs that a person fitting the hypothetical could perform: sewing machine operator, food assembly, telephone sales, parking lot attendant, arcade attendant, surveillance monitor, and self service gas attendant. [R. 171-72]. The ALJ inquired further as to the extent that use of hands would be required in some of the jobs. The vocational expert asked for more specificity as to the hand

impairment, stating that if there was more restriction on hand use, that food assembly and sewing machine operator could be a problem. [R. 173-74].

The ALJ determined that although Plaintiff is impaired by cervical disc disease and bilateral carpal tunnel syndrome and is not capable of performing past relevant work, she retains the capacity to perform work except for that which requires lifting over 10 pounds frequently or 20 pounds occasionally, which requires prolonged walking and standing, or that requires full bilateral grip strength. Based upon the testimony of a vocational expert, the ALJ determined that there are other jobs in the national economy which someone of Plaintiff's age, education, experience, and physical capabilities can perform. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to properly evaluate her allegations of depression, dizziness, loss of balance, and difficulty walking or standing; (2) failed to include numbness and loss of manual dexterity in her residual functional capacity (RFC); and (3) failed to conduct a proper pain/credibility determination. The Court finds that the ALJ did not conduct an adequate credibility analysis and that failure affected the ALJ's RFC findings. The case must therefore be remanded.

Plaintiff claimed she was unable to work due to disabling pain. Her testimony concerning her functional limitations is crucial to determining whether she is capable of engaging in work activities. The ALJ found that Plaintiff's testimony was credible to the extent that it is consistent with the performance of light work activity so long as it does not require prolonged walking and standing, nor require full bilateral grip strength. [R. 28-29]. Such a decision is entirely within the province of the ALJ as the Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990).

The ALJ stated that claimant would be expected to have some pain due to her disc disease and carpal tunnel syndrome. He noted, however, that she did not have a medically determinable impairment that would necessitate her spending all day in bed as she claimed. He also noted that she takes no prescription medication for pain. According to the ALJ, if claimant were in the constant and disabling pain she alleges, it would be reasonable to assume that she would exhaust every means possible to obtain relief. Concerning plaintiff's claim that she is unable to afford medical care, the ALJ stated "[t]here are public facilities available to those who do not have insurance or who are unable to pay for medical care." [R. 28]. Even though it is within the ALJ's province to determine the credibility of a claimant's allegations of disabling pain, the ALJ is not permitted to summarily conclude that the claimant is not

credible without conducting a detailed analysis closely and affirmatively tying the credibility findings to substantial evidence. *Hutson v. Bowen*, 838 F.2d 1125, 1133 (10th Cir. 1988). In this case there are reasons that may have lead the ALJ to discount plaintiff's credibility, however, the ALJ has not provided an adequate explanation of those reasons, and the reasons given by the ALJ are not tied to substantial evidence.

The medical records demonstrate the existence of carpal tunnel syndrome, which, together with cervical disc herniation, has resulted in reduced grip strength. In addition, plaintiff testified that she has trouble with her hands, drops things, doesn't have much of a grip in one of her hands, and can't bend one of her thumbs. [R. 158]. In the hypothetical questioning to the vocational expert, the ALJ made it quite clear that the only functional limitation he found to exist as a result of the carpal tunnel syndrome was a reduced grip strength. The vocational expert testified that plaintiff may not be able to do some of the jobs identified if she had more restrictions in the use of her hands. [R. 173-74]. The degree to which the plaintiff is able to use her hands is a key element in the disability decision, yet the ALJ did not give any reasons for discounting her credibility on this issue. Further, despite finding that Plaintiff has a severe impairment based on her cervical disc disease, the ALJ made no mention of the documented weakness in Plaintiff's left wrist and the decreased range of motion and pain in her left shoulder, arm and hand. [R. 137].

Plaintiff testified that she is a recovering alcoholic and that she does not take medication because she is "terrified of drugs." [R. 159-60]. In *Saleem v. Chater*,

86 F.3d 176, 179 (10th Cir. 1996), the Tenth Circuit cited with approval *Dray v. Railroad Retirement Bd.,* 10 F.3d 1306, 1313 (7th Cir. 1993) and *Stith v. U.S. Railroad Retirement Bd.,*902 F.2d 1284, 1287 (7th Cir. 1990) which held that a claimant need not take medications to which he has a reasonable fear of becoming addicted, even if such medications could relieve his pain and make him able to work. It may be that the ALJ discounted plaintiff's fear of taking medication as an unreasonable fear because the record reflects that only non-narcotic drugs were prescribed, however, the ALJ's decision doesn't say that and the Court is left to wonder about the ALJ's thought process. In addition, there is nothing in the record to substantiate the ALJ's comment concerning the availability of public facilities available to assist plaintiff with her medical care. Failure to indicate the credibility choices made and the basis for those choices in resolving the truthfulness of subjective symptoms and complaints requires reversal and remand. *Kepler v. Chater,* 69 F.3d 387, 391 (10th Cir. 1995).

Since the ALJ did not conduct the required credibility analysis, the case is REVERSED and REMANDED for a proper credibility evaluation. In remanding this case, the Court does not dictate the result. Remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based upon the facts of the case. *Kepler,* at 391.

SO ORDERED this 25th day of February, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

SHERYL BRYANT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 97-CV-1054-BU-M**
	)	
KIMBERLY-CLARK CORPORATION, a Delaware corporation; and WILLIAM KAISER, an individual,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE FEB 26 1998

FILED
FEB 25 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL OF DEFENDANT WILLIAM KAISER

The plaintiff, Sheryl Bryant, pursuant to Federal Rule 41(a)(1) and based on the stipulation of counsel for all parties that have entered an appearance in the case, dismisses all claims against the defendant, William Kaiser, but only as to William Kaiser.

Dated: February 18, 1998.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ENTERED ON DOCKET
	)	
WILLIAM C. MITCHELL,	)	DATE FEB 25 1998
	)	
Defendant.	)	**Civil Action No. 97-CV-592-B**

O R D E R

Upon the motion of the Plaintiff, United States of America, it is hereby **ORDERED** that all claims against defendant William C. Mitchell be dismissed with prejudice.

Dated this 20th day of Feb, 1998.

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 2-25-98

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

JOHN B. IRBY;
NANCY E. IRBY;
COUNTY TREASURER, Washington County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Washington County, Oklahoma,

Defendants.

FILED

FEB 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-547-K

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 23 day of February, 1998.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
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PB:css

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DENNIS F. ROBINSON,
SSN: 447-54-4303

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

FILED

FEB 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-1026-J

ENTERED ON DOCKET
DATE FEB 25 1998

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 23rd day of February 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

(26)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DENNIS F. ROBINSON,
SSN: 447-54-4303

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

ENTERED ON DOCKET
DATE FEB 25 1998

No. 96-C-1026-J

FILED
FEB 23 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner to deny social security benefits.[2/] Plaintiff asserts that the Commissioner erred because (1) the ALJ improperly evaluated and considered the evidence presented, (2) the Appeals Counsel did not properly consider the evidence submitted after the hearing before the ALJ, (3) the ALJ improperly evaluated Plaintiff's complaints of pain and Plaintiff's credibility, (4) the ALJ did not properly evaluate Plaintiff's Residual Functional Capacity ("RFC") and (5) the hypothetical question

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[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

[2/] Administrative Law Judge Dana E. McDonald (hereafter "ALJ") concluded that Plaintiff was not disabled on July 23, 1995. [R. at 17]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on October 10, 1996. [R. at 6].

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presented to the vocational expert did not adequately include Plaintiff's limitations. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born July 17, 1952, and has a twelfth grade education. [R. at 42]. Plaintiff testified that he had constant low back and leg pain. [R. at 48]. Plaintiff believed that he could stand for approximately 10-15 minutes, sit approximately 25-30 minutes, and walk for approximately 10 minutes before his feet would begin to hurt. [R. at 48-51]. Plaintiff additionally noted that he has pain in his chest on a daily basis and that his feet swell. [R. at 63-64].

Plaintiff testified that he usually awakens at six or seven a.m. Plaintiff, on a typical day, will generally go to the park, eat breakfast, play Nintendo (for 20-25 minutes) with his sister's boys, eat lunch, go to his girlfriend's house, and go home around eight p.m. [R. at 52].

Plaintiff believes that the most that he could sit at one time is 25-30 minutes. [R. at 67]. Plaintiff stated that he would be unable to work at a job because after approximately 20-25 minutes, sitting becomes unbearable. [R. at 88].

A Residual Functional Capacity ("RFC") Assessment completed on July 6, 1994, indicated that Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk six out of eight hours and sit six out of eight hours. [R. at 105]. The RFC Assessment was "affirmed as written" on August 23, 1994. [R. at 112].

In an application completed on April 25, 1994, Plaintiff indicated that he visits friends and relatives daily, that he attempts to walk approximately one mile each day,

and that his mother does the household maintenance. [R. at 136]. In a questionnaire which was received on June 15, 1994, Plaintiff indicated that he had no social activities. [R. at 145].

On his pain questionnaire Plaintiff noted that he was allergic to prescription pain medicines and that he used only Anacin or Advil. [R. at 147-149]. Plaintiff indicated that he was restricted from lifting more than five pounds. [R. at 149]. Plaintiff complained of swelling in his feet on various occasions. [R. at 165, 167-69].

An X-ray dated June 10, 1993 indicated a probable herniated disk at L4-5. [R. at 159]. Plaintiff received an epidural steroid injection on August 25, 1993. [R. at 178]. Plaintiff was admitted for surgery on October 25, 1993, and discharged October 28, 1993. [R. at 183]. Plaintiff's treating physicians were Allan S. Fielding, M.D., and David Hicks, M.D. [R. at 183-200].

By November 23, 1993, Plaintiff's doctor reported that Plaintiff had healed nicely and that no pain medicine had been required since Plaintiff's discharge. Plaintiff's doctor noted that Plaintiff had been using a cane and that he informed Plaintiff to stop using the cane and increase the amount that he was walking. [R. at 204]. By January 4, 1994, Plaintiff reported no complaint of significant pain. Plaintiff's doctor noted that the X-rays looked good and he anticipated that Plaintiff would be able to return to work within two to three months. [R. at 203]. In February Plaintiff reported mild low back discomfort. [R. at 202]. Plaintiff was also reportedly weaned from his back brace in February of 1994. [R. at 215-216]. Plaintiff began a work hardening program, but did not continue it because it aggravated his back.

Plaintiff was released by Dr. Hicks on April 19, 1994. Dr. Hicks recommended that Plaintiff begin a retraining program and be restricted from lifting over 50 pounds. [R. at 200].

Plaintiff was examined for the purpose of a Workers' Compensation evaluation. In a letter dated May 17, 1994, the examiner noted that Plaintiff is "unable to return to his position as a laborer as he is unable to perform the heavy lifting and repetitive bending and stooping required in his position. In my opinion, with his limited occupational history and education, he will require vocational rehabilitation in an effort to place him in a light-to-medium position." [R. at 226].

Plaintiff was examined on July 25, 1994. The examiner noted that Plaintiff complained of low back pain which existed, at the present time, to the same extent as it had prior to surgery. [R. at 227]. Plaintiff additionally complained of pain in his legs. Plaintiff listed no other complaints. [R. at 229]. The examiner noted that, in his opinion, the Plaintiff could return to his prior work provided he no longer lifted over 50 pounds. [R. at 230].

A letter from Kenneth R. Trinidad, D.O., dated September 5, 1995, notes that Plaintiff complains that his current pain is more severe than it was three months earlier. [R. at 249]. The doctor noted that Plaintiff's condition had stabilized, but that since May of 1995 it had progressively worsened. Dr. Trinidad recommended referral of Plaintiff to an orthopedist for removal of pedicle screws and noted that pending that Plaintiff was temporarily disabled. [R. at 250].

A lumbar myelogram on November 14, 1995, was interpreted as "abnormal" with a "CT to follow." [R. at 282]. The CT scan indicated "no recurrent disk herniation. Prominent bulges, L3-L4 and L4-L5." [R. at 283]. Plaintiff was examined by Karl N. Detwiler, a neurosurgeon, on December 29, 1995. He noted that Plaintiff had "mechanical low back pain with moderate S1 nerve root impingement." [R. at 291]. He recommended removal of Plaintiff's segmental instrumentation, and a decompression laminectomy and fusion L5-S1. [R. at 292].

Plaintiff had surgery to remove the spinal instrumentation on January 16, 1996. [R. at 275]. Dr. Hicks and Dr. Detwiler performed the surgery.

On February 19, 1996, Dr. Detwiler noted that Plaintiff had advised him that he continued to have pain in his back, with some aching pain in his thigh. Dr. Detwiler noted that Plaintiff continued to have decreased sensation in the L5 distribution, but otherwise no evidence of weakness or reflex abnormality was present. [R. at 287]. Dr. Detwiler noted that he advised Plaintiff to continue to increase his activity and to wear his brace until he was released from the brace by Dr. Hicks.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.[3/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the

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[3/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[4/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ noted that no medical evidence indicated that Plaintiff had ever been diagnosed with an enlarged heart. Although Plaintiff has had high blood pressure and has been treated for hypertension, the ALJ concluded that Plaintiff's hypertension was

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[4/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

controllable with medication and would not affect Plaintiff's ability to work. The ALJ noted that Plaintiff had been informed that he was a carrier of Hepatitis B, but that no evidence indicated that this status would impact Plaintiff's ability to work.

Although the record indicated Plaintiff had previous problems with alcohol, the ALJ concluded that Plaintiff had been sober for ten years and that his previous difficulty had not affected his ability to work.

The ALJ noted that Plaintiff had been released to return to work with a 50 pound lifting restriction by his treating physician. After reviewing the additional medical records, the ALJ concluded that Plaintiff could engage in light work which would allow him to alternatively sit or stand at 30 minute intervals.

The ALJ noted that none of Plaintiff's treating or examining physicians concluded that Plaintiff should not work, but that all of the physicians suggested that Plaintiff return to work after completing vocational retraining.

Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could perform work.

IV. REVIEW

Failure of the Plaintiff to Properly Delineate Issues for Review

Initially, the Court observes that the Plaintiff's brief is a potpourri of numerous sentences and assertions, but no specific issues are delineated on review. Plaintiff is instructed, in the Scheduling Order [Doc. No. 6-1], that Plaintiff's brief should "list each specific error relied upon with specific reference to related transcript page(s)." A review of Plaintiff's brief does not indicate the specific issues raised by Plaintiff on

appeal. The Court, in concluding that the decision of the Commissioner should be affirmed, has attempted to deal with each sentence of Plaintiff's brief that could be interpreted as raising an issue. The Court urges Plaintiff's counsel to more specifically articulate issues for review in the future.

Consideration of the Evidence

Plaintiff asserts that the ALJ improperly considered the evidence. Plaintiff asserts that approximately two years passed between the Plaintiff's job injury in 1993 and the hearing before the ALJ, but that the ALJ did not consider the passage of that time period. The Court is uncertain of exactly what Plaintiff is arguing.

The ALJ reviewed all of the medical evidence and each of Plaintiff's alleged disabling conditions. The Court concludes that the ALJ adequately addressed the medical evidence and Plaintiff's alleged limitations.

Evidence after the ALJ Hearing

Plaintiff additionally asserts that "after the Administrative hearing it was established that the Plaintiff's condition was disabling due to pain and limited mobility." Plaintiff's Brief at 3. Plaintiff notes that his second back surgery, which occurred six months after the hearing before the ALJ, "indicates a severe deterioration of the Plaintiff's back condition." Plaintiff's Brief at 3.

The hearing before the ALJ was June 16, 1995. The ALJ issued his opinion on July 23, 1995. Plaintiff's second surgery occurred on January 16, 1996. Plaintiff submitted the medical records of Plaintiff's second surgery, and such medical records

are properly included in the record. See, e.g., O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994). However, such records can only be considered in a limited fashion.

> If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

20 C.F.R. § 404.970(b).[5/] Therefore, medical records submitted after the decision of the ALJ shall be considered, but only as the records relate to conditions of the claimant prior to the ALJ's decision. See also O'Dell 44 F.3d at 858 ("If the evidence relates to the period on or before the date of the decision, the Appeals Council 'shall evaluate the entire record . . . . '"); Hargis v. Sullivan, 945 F.2d 1482, 1493 (10th Cir. 1991).

The records which were submitted to the Appeals Council and included in the record on review primarily relate to Plaintiff's January 16, 1996 surgery, which occurred after the ALJ's date of decision. The records are relevant only to the extent that they relate to Plaintiff's condition prior to the decision of the ALJ on July 23, 1995.

[5/] This rule coincides with the general rule for filing an application. The "benefits period" is from the time of application until the administrative law judge hearing decision. 20 C.F.R. § 404.620(a). Consequently, if an individual is injured or his injuries are exacerbated after the date of the administrative law judge hearing decision, the individual should file a second application for benefits.

Dr. Trinidad, D.O., wrote a letter on September 5, 1995, noting that Plaintiff complains that his current pain is more severe than it was three months earlier. [R. at 249]. The doctor noted that since May of 1995 Plaintiff's condition had worsened. His letter certainly indicates that any impairment that Plaintiff is claiming is progressive in nature.

A lumbar myelogram on November 14, 1995, was interpreted as "abnormal" with a "CT to follow." [R. at 282]. The CT scan indicated "no recurrent disk herniation. Prominent bulges, L3-L4 and L4-L5." [R. at 283]. Plaintiff was examined by Karl N. Detwiler, a neurosurgeon, on December 29, 1995. He noted that Plaintiff had "mechanical low back pain with moderate S1 nerve root impingement." [R. at 291]. He recommended removal of Plaintiff's segmental instrumentation, and a decompression laminectomy and fusion L5-S1. [R. at 292]. Plaintiff's surgery occurred on January 16, 1996. [R. at 275]. Dr. Hicks and Dr. Detwiler performed the surgery.

On February 19, 1996, Dr. Detwiler noted that Plaintiff had advised him that he continued to have pain in his back. Dr. Detwiler noted that Plaintiff continued to have decreased sensation, but that otherwise no evidence of weakness or reflex abnormality was present. [R. at 287]. Dr. Detwiler noted that he advised Plaintiff to continue to increase his activity and wear his brace until he was released from it by Dr. Hicks.

The Court concludes that the Appeals Council did not err in concluding that the evidence submitted after the hearing by the ALJ did not require a reopening of the ALJ's decision or a change in the decision of the ALJ.

Pain & Credibility Evaluations

Plaintiff additionally states that Plaintiff had a "serious back surgery" prior to the ALJ hearing, and a second surgery only six months after the hearing. Plaintiff argues that the surgeries and back condition would be expected to cause severe pain in the Plaintiff. Plaintiff relies on Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). Plaintiff additionally argues that the ALJ was required "to point to specific evidence to establish that, despite his back pain and limited mobility, the Plaintiff could still perform the light jobs found by the ALJ." Plaintiff's Brief at 3.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

> [I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

> [T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication."). As noted above, medical evidence which is submitted after the hearing before the ALJ is considered only on a limited basis.

The ALJ considered the Plaintiff's testimony and the medical evidence. The ALJ noted that Plaintiff's doctor indicated that at the time Plaintiff was released from the hospital following Plaintiff's first surgery, Plaintiff no longer required prescription pain medicine. [R. at 23]. The ALJ noted that Plaintiff claimed that he had an enlarged heart and that the nurse told him to use a cane, but that the records did not indicate that he had an enlarged heart and the doctor told Plaintiff that he should stop using a cane and that he should walk more. The ALJ commented that the record contained inconsistencies in Plaintiff's description of his chest pain. The ALJ noted that at the hearing Plaintiff testified that he could walk only 10 minutes before resting, but that

on June 14, 1994, Plaintiff reported walking one mile a day. [R. at 26]. In addition, the ALJ noted that Plaintiff's doctor, on November 23, 1993, told him that he should increase his walking (at the time he reported walking one block three times each day). The ALJ noted that Plaintiff stated that he was wearing his brace at the hearing. However, the ALJ observed that on February 8, 1994, Plaintiff's doctor had noted that Plaintiff had been weaned from his brace. The ALJ noted that none of Plaintiff's treating or examining physicians concluded that Plaintiff should not work, but that all of the physicians suggested that Plaintiff return to work after completing vocational retraining.

The Court concludes that the record contains an adequate credibility assessment which is supported by substantial evidence in the record.

Plaintiff additionally asserts that the surgery which occurred after the ALJ hearing lends credibility to his complaints of pain and limited mobility. Plaintiff has an interesting argument. Of course since this evidence was not submitted to the ALJ, the ALJ could not have erred by failing to include it in his credibility assessment of Plaintiff. Regardless, considering the record as a whole, the Court is persuaded that the ALJ's conclusions are supported by substantial evidence.

RFC Evaluation

Plaintiff argues that no specific medical evidence supported the ALJ's finding that Plaintiff can alternatively sit and stand at 30 minute intervals, and therefore this conclusion was not based on substantial evidence. The record contains an RFC evaluation indicating that Plaintiff can sit six hours out of an eight hour day and stand

six hours out of an eight hour day. [R. at 105]. In addition, none of Plaintiff's treating physicians suggested that Plaintiff was unable to work or should have any restrictions other than not lifting 50 pounds. The ALJ's inclusion, to the vocational expert, of a sit and stand at 30 minute intervals requirement was fairly generous. The Court concludes that the record contains substantial evidence to support the RFC assessment of the ALJ.

Hypothetical Question to Vocational Expert

Plaintiff additionally asserts that the ALJ failed to present all of the Plaintiff's actual limitations to the vocational expert and therefore the vocational expert's testimony cannot constitute substantial evidence to support the conclusion of the Commissioner that a substantial number of jobs exist which the Plaintiff can perform.

An ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995) (ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). After reviewing the record in this case, the Court concludes that the hypothetical question to the vocational expert adequately included Plaintiff's limitations.

Accordingly, the Commissioner's decision is **AFFIRMED.**

Dated this 23 day of February 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC.,
Plaintiff,

vs.

BEST LEASING, INC., and ALDO MUROS, an individual,
Defendants.

Case No. 96-C-1136-BU

JUDGMENT

This matter came before the Court for trial sitting without a jury on February 24, 1998. As counsel for Defendant, Best Leasing, Inc., represented that a Chapter 11 petition had been filed in New Jersey for Defendant, Best Leasing, Inc., the Court stayed the trial as to Defendant, Best Leasing, Inc. The Court announced that it would proceed to trial as to Defendant, Aldo Muros, only. Defendant, Aldo Muros, failed to make an appearance for the trial. Plaintiff, Thrifty Rent-A-Car System, Inc., presented evidence as to the claims against Defendant, Aldo Muros. Having heard the evidence and having rendered a decision,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff, Thrifty Rent-A-Car System, Inc., and against Defendant, Aldo Muros, on the guaranties for the Master Lease Agreement and Courtsey Vehicle Lease Agreement in the amount of $747,222.16 and on the guaranty for the Promissory Note in the amount of $98,141.02, for a total judgment in the sum of $845,363.18, with post-judgment interest, costs and attorneys' fees as provided by law.

DATED at Tulsa, Oklahoma, this 24th day of February, 1998.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RON CARLIN,

Plaintiff,

vs.

WYETH-AYERST LABORATORIES COMPANY, a Division of American Home Products Corporation; GATE PHARMACEUTICALS, INC.; ABANA PHARMADEUTICALS, INC.; RICHWOOD PHARMACEUTICAL COMPANY, INC.; ION LABORATORIES, INC.; MEDEVA PHARMACEUTICALS, INC.; A.H. ROBINS COMPANY, INC.; SAINT FRANCIS HOSPITAL, SPRINGER CLINIC, DR. SCOTT SEXTER, and PACIFICARE,

Defendants.

Case No. 98-CV-0101H(M)

ORDER GRANTING DEFENDANT'S MOTION TO WITHDRAW REMOVAL AND REMAND TO STATE COURT

Upon Motion of the Defendant, PacifiCare of Oklahoma, this Court hereby remands this case to State Court.

JUDGE OF THE DISTRICT COURT

Submitted by:
Kimberly Lambert Love, OBA #10879
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 2-24-98

AARON I. JORDAN,

Plaintiff,

vs.

STANLEY GLANZ, CORPORAL GAUL, D.O. PENDEGRASS, D.O. ELLENBARGER, D.O. BOBBY WALSH, D.O. KEITH ELROD, D.O. GUS JONES, SGT. COLE, D.O. CASEY, CORPORAL TANSY, INTERNAL AFFAIRS OFFICER LT. DICK BISHOP, OTHER T.C.S.O. DETENTION OFFICERS UNKNOWN TO PLAINTIFF AT THIS TIME; ALL TO BE SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Defendants.

No. 97-CV-577-H (M)

FILED
FEB 20 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a *pro se* inmate, has been granted leave to proceed in forma pauperis in this civil rights action filed pursuant to 28 U.S.C. § 1983. Plaintiff has now paid the initial partial filing fee to commence this action. The Court concludes, however, that Plaintiff's claim is barred by the statute of limitations and that therefore this complaint should be dismissed as frivolous, as mandated by 28 U.S.C. § 1915A.

The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review

before docketing, or as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity and to "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted." Id. A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

In his *Complaint*, filed on June 16, 1997, Plaintiff alleges that Defendants violated his civil rights by the "unlawful, excessive, use of chemical agent weapons, lack of follow up procedures thereafter." See Docket #1. His claim is based on his own recollection of events which he alleges occurred in October--December, 1994, January--February, 1995, and September--December, 1994. (Docket #1, Plaintiff's Exhibit No. 7). He seeks $100,000.00 in compensatory damages and $150,000.00 exemplary damages form each liable defendant as well as declaratory relief on his corporal punishment issue.

After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff's claim against Defendants is barred by the two-year statute of limitations. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed"). The

applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988).

Based on the facts alleged in the *Complaint*, Plaintiff's cause of action arose, at the latest, in February of 1995,[1] more than two (2) years prior to the filing of his complaint on June 16, 1997. Therefore, Plaintiff's claim against Defendants became time barred, at the latest, after February, 1997. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (the State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners). Because it is clear from the face of the *Complaint* that Plaintiff's action lacks an arguable basis in law, the Court concludes that the *Complaint* should be dismissed as frivolous.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's action is **dismissed** as frivolous. The Clerk shall mail to Plaintiff a copy of the *Complaint* along with a copy of this Order.

---

[1]In his complaint, Plaintiff states that he was a juvenile at the time the events giving rise to this action occurred. Okla. Stat. tit. 12, § 96 provides that "[i]f a person entitled to bring an action other than for the recovery of real property...be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one (1) year after such disability shall be removed...." Thus, although the limitations period is tolled during a person's minority, a recognized legal disability in Oklahoma, the person must bring the action within one year after reaching the age of majority. In this case, Plaintiff stated, in his answers to the Court's questions, that his date of birth was May 23, 1977 (Docket #6, question #2). Because Plaintiff reached the age of majority on May 23, 1995 and this action was not filed until more than two years later, on June 16, 1997, the fact that Plaintiff was a minor at the time of the events giving rise to his claims does not change the outcome here. This action is time-barred.

2. For purposes of counting "prior occasions" under 28 U.S.C. § 1915(g), the Clerk of the Court is directed to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915A(b).

IT IS SO ORDERED.

This 20TH day of February, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SAMSON RESOURCES COMPANY,

Plaintiff,

v.

INTERNATIONAL BUSINESS PARTNERS, INC.

Defendant.

Case No. 94-C-934-H

ADMINISTRATIVE CLOSING ORDER

The parties in this matter have been ordered to arbitration and further proceedings have been stayed. It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 20TH day of February, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER C. SMITH,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 96-CV-696-H

ORDER

Plaintiff, a prisoner appearing pro se and in forma pauperis, originally filed this civil rights complaint on August 1, 1996. A review of the file for this case reveals that on August 21, 1996, Plaintiff was directed to file an amended complaint within fifteen (15) days or the original complaint would be dismissed for failure to state a claim. The copy of the August 21, 1996 Order mailed to Plaintiff was returned in an envelope marked "attempted not known." Plaintiff did not file the amended complaint as ordered, and on September 19, 1996, this action was dismissed without prejudice for failure to state a claim.

Thereafter, Plaintiff submitted two letters (Docket #s 6 and 7), notifying the Court of his change of address and requesting information concerning this case. In his December 1996 letters, Plaintiff explained that he did not receive a copy of the August 21, 1996 Order until after the case had been dismissed even though he had been at Tulsa County Jail when the Order was mailed. Plaintiff stated he was confined at the Tulsa County Jail from February 21, 1996, until he was transferred to Lexington Correctional Center on November 5, 1996, and he provided a copy of the reception form as verification. The Court liberally construed these letters as requests for reconsideration of the dismissal and for appointment of counsel. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

By Order, dated June 11, 1997, the Court determined that Plaintiff had shown sufficient cause for his non-compliance with the August 21, 1996 Order and directed the Court Clerk to reopen Case No. 96-CV-696-H. Plaintiff was allowed an additional fifteen (15) days from the date of filing of the Order in which to file an amended complaint, setting out his allegations in "simple, concise, and direct" statements. The Clerk was also directed to mail copies of all previously issued Orders, a copy of the original complaint, and blank complaint forms, labeled "amended," along with the filing instructions to the Plaintiff. Plaintiff was cautioned that all pleadings and motions must be in compliance with the Federal Rules of Civil Procedure as well as the Local Civil Rules of the United States District Court for the Northern District of Oklahoma. To date, Plaintiff has not submitted an amended complaint in compliance with the June 11, 1997 Order. Therefore, the Court finds that Plaintiff has not complied with Orders of this Court and his complaint should be dismissed without prejudice for failure to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii).

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's civil rights complaint is **dismissed without prejudice** for failure to state a claim upon which relief may be granted.
2. Any pending motion is **denied as moot**.
3. The Clerk is directed to **flag** this as a dismissal pursuant to 28 U.S.C. § 1915(e) for purposes of counting "prior occasions" under § 1915(g).

IT IS SO ORDERED.

This 20TH day of FEBRUARY, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID LEE MAYWALD,)
)
Plaintiff,)
)
vs.) No. 97-CV-936-H (J)
)
RON CHAMPION,)
)
Defendant.)

ORDER

On October 15, 1997, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983, and a motion for leave to proceed in forma pauperis. By order entered October 30, 1997, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he filed both an amended motion for leave to proceed in forma pauperis to include the certified copy of Plaintiff's institutional account(s) statement for the 6-month period preceding the filing of his complaint and a completed summons and Marshal form for each named Defendant. Also, the Clerk of Court was directed to mail Plaintiff the forms and information for preparing the documents ordered by the Court. Plaintiff was also advised that unless the deficiencies were cured by December 1, 1997, "the Court will dismiss this action without prejudice and without further notice." To date, Plaintiff has not submitted the required documents. No correspondence has been returned to the Court.

Because Plaintiff has failed to comply with the Court's Order of October 30, 1997, and has failed to pay the filing fee or file a properly supported motion for leave to proceed in forma pauperis,

the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute. See Fed. R. Civ. P. 41(b).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights complaint is **dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 20th day of February, 1998.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NELDIA ANN WAY and STEVEN EDWARD WAY,

Plaintiffs,

vs.

FARMERS INSURANCE COMPANY, INC., a Kansas Corporation,

Defendant.

Case No. 98-CV-117-BU

ORDER

On February 12, 1998, Defendant removed this action from the District Court of Tulsa County, Oklahoma, pursuant to 28 U.S.C. § 1441(a). In its Notice of Removal, Defendant asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed $75,000.00. 28 U.S.C. § 1332(a). The amount in controversy is generally determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S.Ct. 174 (1995). "The burden is on the party requesting removal to set forth, in the notice of removal itself, the "'underlying facts supporting [the] assertion that the amount in controversy exceeds $50,000.'" Id. (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992)(emphasis in original)). Furthermore, there is a presumption against removal jurisdiction.

(4)

Id.

In the instant case, Plaintiffs' Petition does not set forth allegations which establish the requisite jurisdictional amount. The Petition merely seeks a judgment against Defendant for actual damages "in excess of Ten Thousand Dollars ($10,000.00)" and punitive damages for the maximum amount allowed by law for Plaintiffs' claim of breach of the implied duty of good faith and fair dealing. Consequently, Defendant bears the burden of actually proving the facts to support the jurisdictional amount. Gaus, 980 F.2d at 566-67. Here, Defendant, in the Notice of Removal, has not offered any underlying facts to support the Court's exercise of diversity jurisdiction. Defendant has only alleged in the Notice of Removal that "[t]he matter in controversy in said action, exclusive of interests and costs, exceeds Seventy Five Thousand Dollars ($75,000.00)." This conclusory allegation does not, however, satisfy Defendant's burden of setting forth, in the removal petition itself, the underlying facts to establish the requisite amount in controversy.[1]

Section 1447(c) of Title 28 of the United States Code provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). In the instant case, the face of Plaintiffs' Petition does not affirmatively establish the jurisdictional amount and the Notice of Removal does not set forth

[1] The Court notes that Defendant alleges in the Notice of Removal that Plaintiffs have contract claims pending for damages to their personal property and to the residence and that the amounts involved are in excess of $120,000.00. However, this allegation does not meet Defendant's burden of proof as the contract claims are not alleged in the Petition.

specific facts to establish that there is more than $75,000.00 at issue in this case. Thus, the Court finds it lacks subject matter jurisdiction over this matter. In accordance with 28 U.S.C. § 1447(c), the Court hereby **REMANDS** this matter to state court. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 23rd day of February, 1998.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY A. OUSLEY,
SSN: 444-50-0655

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 96-C-1162-J

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 20th day of February 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

16

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARY A. OUSLEY,
SSN: 444-50-0655

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

No. 96-C-1162-J

ORDER[2/]

Plaintiff, Mary A. Ousley, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff assert that the Commissioner erred because (1) the ALJ's finding that Plaintiff can do light work is not supported by substantial evidence, (2) the ALJ did not provide appropriate reasons for his decision, and (3) the ALJ improperly relied on the Grids. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Administrative Law Judge Leslie S. Hauger, Jr. (hereafter "ALJ") concluded that Plaintiff was not disabled on October 24, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on October 11, 1996. [R. at 4].

(15)

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on December 25, 1950, and was 44 years old at the time of the decision by the ALJ. [R. at 29]. Plaintiff attended high school until the tenth grade and obtained her GED. Plaintiff additionally completed some vocational training. [R. at 29].

Plaintiff testified that she could stand for only thirty minutes to an hour. [R. at 32]. Plaintiff additionally stated that she has pain in all of her muscles all over her body. According to Plaintiff the pain is usually at a level of eight or ten. [R. at 33]. Plaintiff takes muscle relaxers and Motrin for her pain. [R. at 34]. Plaintiff additionally testified that she had chest pains and that during such chest pains her pain is at a ten. [R. at 35].

Plaintiff stated that she shops for groceries, does laundry, lifts her granddaughter, fixes breakfast, takes care of her grandchildren, cleans the bathroom, fixes dinner, can walk approximately one hour before having to sit down, and can sit approximately one hour before she has to stand. [R. at 37, 41-42]. Plaintiff additionally stated that she has pain in the bottom of her feet and that she experiences headaches. Plaintiff testified that she could not lift 20 pounds. [R. at 43].

In a report submitted to the Social Security Administration, Plaintiff noted that she goes fishing on Tuesdays and Thursdays and rides the bus. [R. at 67].

A social security examiner reported that Plaintiff needed glasses, but that Plaintiff exhibited no deformities in her joints, no swelling, no heat, and no tenderness. [R. at 78]. Plaintiff's back and her gait were reported as normal. [R. at 79]. Plaintiff

was diagnosed with myopia, peptic ulcer history, history of cirrhosis, history of muscle spasms. [R. at 80]. Although range-of-motions were recorded by the examiner, no residual functional capacity assessment was completed. [R. at 80].

Plaintiff has very few medical records to support her claim. Plaintiff reported chest pain to her doctors on a few occasions, but no difficulties have been documented. [R. at 91]. X-rays of Plaintiff's lungs were reported as clear. [R. at 101]. Plaintiff reported occasional stomach pains, neck, back and shoulder pains, arthritis, dizzy spells, and sinus problems. [R. at 109, 115, 117, 122].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.[4/] See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

[4/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[5/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ found that Plaintiff could not return to her past relevant work. The ALJ found that Plaintiff could perform a full range of light work. The ALJ, relying upon the Grids[6/], concluded that Plaintiff could, at Step Five, engage in substantial gainful activity.

[5/] Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

[6/] The Medical-Vocational Guidelines, commonly referred to as the "Grids," are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2.

IV. REVIEW

The ALJ found that Plaintiff could perform light work. In accordance with the regulations, "light work" requires "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . ." 20 C.F.R. § 404.1567(b).

The ALJ concluded that Plaintiff could not perform her past relevant work. This conclusion means that Plaintiff has some restrictions. The ALJ additionally found that Plaintiff could perform a full range of light work. This finding requires support, in the record, that Plaintiff could lift 20 pounds occasionally, fifteen pounds frequently, walking or standing a substantial amount of the time, or sitting and pushing or pulling of arm or leg controls.

Although the ALJ found that Plaintiff could perform a full range of light work, the record contains nothing to indicate Plaintiff's physical capabilities. The record contains no RFC Assessment. None of Plaintiff's doctors and none of the Social Security Administration doctors indicate any of Plaintiff's physical or mental restrictions.[7/] Plaintiff testified that she could lift fifteen pounds, stand approximately

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7/ One doctor does provide Plaintiff's range-of-motion abilities.

one hour, and sit approximately one hour. Plaintiff's testimony does not, by itself, support the conclusion that Plaintiff can perform light work as defined by the Social Security Administration.

In Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993), the Court of Appeals for the Tenth Circuit emphasized that "the absence of evidence is not evidence." The court noted that "the ALJ, finding no evidence upon which to make a finding as to RFC, should have exercised his discretionary power to order a consultative examination of Ms. Thompson to determine her capabilities." Id. In this case, although one consultative examination was conducted, the examiner gave no specifics as to Plaintiff's abilities.

The record contains very little medical evidence to support Plaintiff's claim of disability. However, the ALJ concluded, based on the record, that Plaintiff could not perform her past relevant work. If a claimant cannot return to her past relevant work, the ALJ must proceed to Step Five and determine whether the individual may engage in other substantial gainful activity. At Step Five the burden shifts to the Commissioner to establish that a significant number of jobs exist in the national economy. In this case, the ALJ attempted to meet this burden by relying on the Grids. Such reliance is perfectly acceptable if a Plaintiff has no non-exertional limitations. In this case the ALJ concluded that Plaintiff had no non-exertional limitations and therefore appropriately applied the Grids. However, the problem in this case is that the record does not contain sufficient evidence to support the ALJ's conclusion that

Plaintiff can perform a full range of light work.[8/] On remand the ALJ should obtain a Residual Functional Capacity Assessment completed by a medical doctor which indicates Plaintiff's RFC.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinon.

Dated this 20 day of February 1998.

Sam A. Joyner
United States Magistrate Judge

[8/] The Court notes that the ALJ made no alternative finding that Plaintiff could perform sedentary work.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
v.	)	**Case No. 97-CV-1092K(M)**
WESTERN GIANT ENTERPRISES, INC., a California corporation, and AUGUSTINE K. LEE, an individual,	)	
Defendants.	)	

JOURNAL ENTRY OF DEFAULT JUDGMENT

NOW on this 20 day of February, 1998, the above-styled case comes on before the Court. The Plaintiff appearing by its attorney, Steven W. Soulé of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., and the Defendant Augustine K. Lee, having been duly and properly served, appears not. The Court, being fully advised and having reviewed the pleadings on file herein, finds and orders as follows:

1. That Plaintiff Thrifty Rent-A-Car System, Inc. ("Thrifty") is an Oklahoma corporation with its principal place of business in Tulsa County, State of Oklahoma, and that Defendant Augustine K. Lee ("Defendant Lee") is a citizen and resident of the State of California, and that Defendant Lee has had significant contacts with the State of Oklahoma in connection with the below described agreements. Therefore, this Court has jurisdiction over the subject matter herein and the parties hereto.

2. The Defendant Lee has been duly and properly served with Summons herein. That the answer date for Defendant Lee has expired without his having answered or otherwise pled herein and Defendant Lee is adjudged in default pursuant to Rule 55(b)(2) of the Federal Rules of Civil

Procedure, and accordingly, all allegations in Plaintiff's Amended Complaint filed January 13, 1998 (the "Amended Complaint"), shall be deemed true.

3. On May 1, 1995, an agreement entitled "License Agreement for Vehicle Rental, Leasing & Parking" (the "License Agreement") was entered into between Western and Thrifty. The License Agreement granted Western the right to operate a Thrifty Car Rental business in a portion of Los Angeles County in the State of California as more specifically defined in the License Agreement.

4. On May 1, 1995, an agreement entitled "Master Lease Agreement" (the "Master Lease Agreement") was entered into by Western and Thrifty, for the purpose of leasing to Western vehicles to be used in the operation of Western's Thrifty Car Rental franchise.

5. Pursuant to paragraph 3.20 of the License Agreement, Western agreed to pay to Thrifty, as and when due, all obligations incurred by Western to Thrifty in the operation of the Thrifty Car Rental business, whether incurred under the License Agreement or any other agreements with Thrifty.

6. The obligations of Western under the License Agreement were personally guaranteed by Defendant Lee. In connection with the execution of the Master Lease Agreement, Defendant Lee executed a personal guaranty, pursuant to which he unconditionally guaranteed the performance of all obligations and the payment of all sums or damages which are due and payable to Thrifty.

7. Western ordered and took delivery of vehicles pursuant to the Master Lease Agreement, as well as the terms of the various Lease Programs promulgated from time to time by Thrifty. Western is a signatory party to the Vehicle Lease Orders. Western is still in possession of approximately ninety-one (91) vehicles delivered under the terms of those documents.

8. Defendant Lee is in default of obligations under the License Agreement and the Master Lease Agreement described above by failing to pay Thrifty approximately $310,333.84.

9. Pursuant to the terms of the Master Lease Agreement, Thrifty issued a notice of termination of the Master Lease Agreement, effective immediately, by letter to Western and Defendant Lee, dated December 8, 1997, and delivered by facsimile and UPS overnight mail on December 8, 1997.

10. Thrifty also issued a notice of termination of the License Agreement by letter to Western and Defendant Lee, dated December 11, 1997, and delivered by facsimile, by certified mail and UPS overnight mail on December 11, 1997.

11. Defendant Lee has failed to pay certain amounts now due or past due under the License Agreement and the Master Lease Agreement. As a result of the breaches of the License Agreement and the Master Lease Agreement, Defendant Lee is indebted to Thrifty for all such amounts due and for all additional amounts which may become due thereunder. Despite demand for payment, Defendant Lee has refused and continue to refuse to pay the amounts due. Thrifty is entitled to a judgment for those amounts.

12. Pursuant to the terms of the License Agreement and the Master Lease Agreement, Thrifty is entitled to an award of its attorney's fees and costs incurred herein.

13. The amount currently due under the License Agreement and the Master Lease Agreement as more fully described in the Amended Complaint, including interest due pursuant to those agreements is $310,333.84, plus interest at the rate of $155.17 per day from February 11, 1998, through the date of judgment. Thrifty has incurred reasonable attorney's fees in the amount of $4,890.50 and costs in this action in the amount of $212.99.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the Defendant, Augustine K. Lee, has wholly failed and refused to timely answer or otherwise plead herein and therefore is in default, and as a result of such default, all material allegations in Thrifty's Complaint are deemed confessed by said Defendant, and that judgment should be entered against said Defendant Augustine K. Lee accordingly.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Thrifty Rent-A-Car System, Inc. have and recover judgment in its favor against the Defendant, Augustine K. Lee, (i) for the amount of $310,333.84, plus interest at the rate of $155.17 per day from February 11, 1998, through the date of judgment, (ii) reasonable attorney's fees in the amount of $4,890.50 and costs in this action in the amount of $212.99, plus (iii) post-judgment interest at the statutory rate of 5.23% per annum until paid, plus all accruing attorneys' fees and costs incurred herein.

JUDGE OF THE DISTRICT COURT

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
Steven W. Soulé, OBA #13781
320 S. Boston, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0466
(918) 594-0505 (facsimile)
ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN J. AFFELD,)
)
Plaintiff,)
)
vs.) Case No. 97-CV-461-K (J)
)
CRONATRON WELDING SYSTEMS,)
)
Defendant.)

ORDER

Before the Court is the defendant's Motion to Dismiss. Plaintiff brought this action seeking compensatory and punitive damages against the defendant for alleged violations of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and for alleged breach of an employment contract. Defendant has filed the present motion, seeking dismissal on all three causes of action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Affeld was hired by Cronatron as National Sales Manager pursuant to an employment agreement executed by the parties on February 8, 1985. In support of its motion, Cronatron provides a letter, dated June 15, 1990, from Bernard Kalish, Chairman of the Board of Cronatron, which notified Affeld of the change of his position within the company and his compensation package for the six (6) years beginning on July 1, 1990. Cronatron claims this letter serves as notice of termination as specified in the original 1985 contract between the parties. At the end of the six-year period specified in the 1990 letter, the plaintiff was terminated by Cronatron. Affeld alleges he is a member of protected classes under both the ADA and the ADEA.

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On or about September 23, 1996, Affeld filed a charge of discrimination with the EEOC in which he alleged that Cronatron discriminated against him on the basis of his disability by denying him reasonable accommodation and subsequently terminating his employment on or about June 1, 1996. Affeld claims this action also included a charge of discrimination based on his age. Defendant contends that it did not. Affeld never received a "right-to-sue" letter from the EEOC. He filed this lawsuit on May 12, 1997.

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, this Court must accept the well-pleaded allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Jojola v. Chavez, 55 F.3d 488, 490 (10th Cir. 1995). It is with this in mind that the Court considers the following.

First, the defendant contends that the plaintiff's first cause of action, the ADA claim, should be dismissed due to the fact the plaintiff has not yet received a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). Title VII administrative remedies, including the requirement that a claimant receive a right-to-sue notice before bringing a civil action, are made applicable to claims brought under the ADA by 42 U.S.C. § 12117. The Supreme Court has held that these are statutory, not jurisdictional, requirements and are akin to a statute of limitations. Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982). Employees are required to file a charge of discrimination with the EEOC within 300 days of the alleged violation before commencing a suit under the ADA. 42 U.S.C. §12117(a). If the EEOC does not file a civil action or an agreement is not reached between the parties, the EEOC "shall so notify the person aggrieved and within ninety days after the giving of such notice, a civil action may be brought against the respondent named in the charge . . ." Id.

Despite the Supreme Court's decision in Zipes, several circuit courts, including the Tenth Circuit, have recently held that Title VII's exhaustion of administrative procedures requirement is jurisdictional. See Jones v. Runyon, 91 F.3d 1398, 1399, n. 1 (10th Cir. 1996) cert. denied, 117 S. Ct. 1243 (1997); Davis v. North Carolina Dept. of Correction, 48 F.3d 134, 137-38 (4th Cir. 1995); Bullard v. Sercon Corp., 846 F.2d 463, 468 (7th Cir. 1988); See also McSherry v. Trans World Airlines, 81 F.3d 739, 740 n. 1 (8th Cir. 1996)(suit barred until the employee has received a right to sue letter). Other courts have described the right to sue notice as merely a precondition subject to equitable tolling and waiver. See Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1487 (6th Cir. 1989). However, whether this requirement is jurisdictional or simply a condition precedent to filing is not of great concern in the present case. The defendant has unequivocally asserted the plaintiff's failure to exhaust administrative remedies and thus there could be no waiver of this defense even if it is considered to be a non-jurisdictional defense and the plaintiff has made no showing of any circumstances which would warrant equitable tolling in this case. In addition, recently, in Schmitt v. Beverly Health and Rehabilitation Serv., 962 F. Supp. 1379 (D.Kan. 1997), the court found that since the plaintiff in the case did not allege the agency had issued her a right-to-sue letter prior to the filing of her lawsuit and since the facts presented precluded her from so alleging, the ADA claim should be dismissed. Id. at 1383.

In the present case, the plaintiff did not allege receipt of a right-to-sue letter in his complaint and does not dispute the fact that he has not received a right-to-sue letter. He simply states that he has made a request and that eventually he will receive one. In support of the motion to dismiss, the defendant provides a fax from Susan Humphries, Secretary to the Director of the EEOC, which states the plaintiff's case "is still open and being investigated . . . " and mentions nothing about the issuance of a right-to-sue letter. (Defendant's Reply Memorandum, Exhibit B).

The mere request of a right-to-sue letter is insufficient to satisfy the statutory prerequisite, and the Court finds plaintiff's ADA claim is premature. Viewing the complaint in the light most favorable to the plaintiff, the Court is unable to find plaintiff's allegations sufficient to state a claim and thus the defendant's motion with regard to the plaintiff's first cause of action is granted and plaintiff's ADA claim is hereby dismissed without prejudice.

The defendant next argues that the second cause of action, the ADEA claim, should be dismissed because the plaintiff failed to file a timely charge of age discrimination with the EEOC.

Before a federal lawsuit can be filed under the ADEA, exhaustion of administrative remedies is required. Jones, 91 F.3d at 1399. Although Jones is a Title VII case, this exhaustion requirement is construed identically as that in ADEA cases. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756-8 (1979). Before filing the federal lawsuit, the plaintiff is required to file a charge of age discrimination with the EEOC within 300 days of the alleged violation. 29 U.S.C. §626(d)(2). If the plaintiff fails to timely file such a charge, the district court has no jurisdiction over the ADEA claim. Jones, 91 F.3d at 1400.

In this case, the plaintiff's charge of discrimination with the EEOC states "I believe I was discriminated against because of my disability, in violation of The Americans With Disabilities Act of 1990." Under the heading "Cause of Discrimination Based On," the plaintiff has checked the box labeled "disability" but not the one labeled "age." Since this charge of discrimination is a matter of public record, this Court may take judicial notice of it in deciding the motion to dismiss. Gallo v. Board of Regents of Univ. of California, 916 F. Supp. 1005 (S.D. Cal. 1995). Additionally, because the Tenth Circuit considers this a jurisdictional matter, Jones, 91 F.3d at 1399, this Court may look outside the pleadings to decide the jurisdictional issue pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure. Holt v. U.S., 46 F.3d 1000, 1003 (10th Cir.

1995). In addition, the letter from the EEOC mentioned above states that the only charge filed by this plaintiff is one for disability. (Defendant's Reply Memorandum, Exhibit B).

The plaintiff provides a copy of a "memo," not addressed or file stamped, in which sentence II and III are worded almost identically to the corresponding sentences in the actual charge of discrimination filed with the EEOC, except that added to the end of both sentences is the phrase "and my age (over 40)." (Plaintiff's Brief in Support of Response, Exhibit A). The plaintiff also provides a copy of the mail-in information sheet, which specifically states "this is not a charge of discrimination" across the top, wherein he has checked a box for ADEA and for ADA. (Plaintiff's Brief in Support of Response, Attachment).

It must be noted that on the charge of discrimination which was filed with the EEOC alleging only discrimination as the basis of disability, paragraph I states the plaintiff was "discharged from the position of Vice-President of Sales on or about June 1, 1996." In contrast, paragraph I of the memo also listing age, provided by the plaintiff, states that the plaintiff was "subsequently discharged from the position of Vice-President of Sales in 1990 and given the title of Consultant."

Even if this Court finds that the memo from the plaintiff which lists age as a discriminating factor constitutes an actual charge of discrimination (which it could not, as there is no evidence of filing), there is a serious problem with this claim. If this Court finds this memo was "filed" along with the actual charge of discrimination which is file stamped September 23, 1996, then the plaintiff missed the 300-day filing requirement by several years given the fact the alleged age violation mentioned in the memo occurred in 1990. If, in the alternative, the Court finds that the only recognizable charge of discrimination is the one actually filed alleging the 1996 disability violation, the plaintiff's case must be dismissed because there is no indication of an ADEA claim

in that charge and the 300-day filing statute has now passed thus preventing the plaintiff from filing an ADEA claim with the EEOC.

Based on the above analysis and the EEOC's letter stating the only claim filed on behalf of this plaintiff is a disability charge, the defendant's motion to dismiss in regards to the plaintiff's second cause of action, the ADEA claim, is hereby granted.

Finally, the defendant requests dismissal with prejudice of the plaintiff's breach of contract claim. Originally, this dismissal was requested on the basis of the statute of limitations. After the plaintiff failed to respond to the defendant's motion to dismiss regarding this third cause of action, the defendant requested dismissal based on the plaintiff's failure to respond. This court has the discretion to interpret plaintiff's failure to respond to the defendant's motion to dismiss as a representation of no opposition and the defendant's motion could be granted on this basis alone. N. D. Okla. R. 7.1 (C). However, before granting a motion to dismiss as uncontested, a review of the cause of action is warranted due to the preference of this Court and of the Tenth Circuit for consideration on the merits. See Miller v. Dept. of Treasury, 934 F.2d 1161, 1162 (10th Cir. 1991); Hancock v. City of Okla. City, 857 F.2d 1394, 1396 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512, 1519-22 (10th Cir. 1988).

However, another basis for dismissal exists. District courts have the option of accepting or declining supplemental jurisdiction over a claim when, as here, "the district court has dismissed all claims over which it has original jurisdiction. . . ." 28 U.S.C. § 1367(c)(3). The Supreme Court has found that "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). In a more recent case, the Court explained that the Gibbs rule is not mandatory and went on to emphasize that when federal claims are dismissed before trial, courts must consider judicial

economy, convenience, and fairness in deciding whether to dismiss the state claim also. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n.7 (1988). The Tenth Circuit has also addressed this issue, recently stating, "[w]e have held that when, as here, the federal claims are resolved prior to trial, the district court should usually decline to exercise jurisdiction over pendant state law claims and allow a plaintiff to pursue them in state court." Wal-Mart Stores, Inc., v. City of Cheyenne, 120 F.3d 271, 1997 WL 446896 (10th Cir. 1997) (citing Ball v. Renner, 54 F.3d 664, 669 (10th Cir. 1995)).

In the present case, the only cause of action remaining for consideration is the plaintiff's breach of contract claim which is governed by state law. No allegation of diversity of citizenship is present in the complaint. There is no evidence that judicial economy, convenience, or fairness will be hindered by this court's refusal to exercise supplemental jurisdiction over this claim. Therefore, the plaintiff's third cause of action for breach of contract properly belongs in state court and is hereby dismissed without prejudice.

It is the Order of the Court that the motion of the defendant to dismiss (#7) is hereby granted. Plaintiff's first cause of action pursuant to the Americans With Disabilities Act is dismissed without prejudice for failure to exhaust administrative remedies. Plaintiff's second cause of action pursuant to the Age Discrimination in Employment Act is dismissed for failure to timely file an administrative charge. Plaintiff's third cause of action for breach of contract is hereby dismissed without prejudice for lack of supplemental jurisdiction.

ORDERED this 20 day of February, 1998.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J. MICHAEL RITZE,	)	ENTERED ON DOCKET
	)	
Plaintiff,	)	DATE 2-23-98
	)	
v.	)	No. 98-CV-0057H (M)
	)	
A. AINSLIE STANFORD, NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,	)	
	)	
Defendants.	)	

FILED
FEB 20 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RULE 41 STIPULATION OF DISMISSAL AS TO A. AINSLEE STANFORD ONLY

It is hereby stipulated that the above-entitled action may be dismissed with prejudice as to A. Ainslee Stanford only, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure.

DATED this 20th day of February, 1998.

J. Lance Hopkins
Attorney for Plaintiff

Attorney for A. Ainslee Stanford

Attorney for Northwestern Mutual Life Insurance Company

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 97CV866 H (M)
	)	
Valerie Perry,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE 2-23-98

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 20th day of February, 1998.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of February, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Valerie Perry, 1534 E. 66th Place, Tulsa, OK 74105.

Sue B. Aldridge

Sue B. Aldridge
Financial Litigation Agent

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY,

Plaintiff,

vs.

ZINKCO, INC., JOHN SMITH ZINK, and ZEECO, INC.,

Defendants.

Case No. 85-C-292-K (M)

REPORT AND RECOMMENDATION

Plaintiff, John Zink Company's EMERGENCY MOTION FOR CONTEMPT, ENFORCEMENT OF JUDGMENT, EXPEDITED DISCOVERY, EXPEDITED HEARING AND MONETARY AWARD [Dkt. 179] is before the undersigned United States Magistrate Judge for certification of the facts to the district court and for report and recommendation. The parties have conducted discovery and have submitted trial briefs, the Court held a hearing on John Zink Company's motion November 17, 18, and 19, 1997, in which evidence was received and arguments of counsel were heard.

BACKGROUND

The John Zink Company was founded in 1929 by John Steele Zink, father of the defendant, John Smith Zink. In 1972 John Steele Zink and John Smith Zink sold the John Zink Company to the Sunbeam Corporation in exchange for Sunbeam stock valued at forty million dollars, twenty nine million of which was paid for the trade secrets, trade name, reputation and company potential. John Smith Zink ("Mr. Zink") served as a director of the John Zink Company and was employed as President of the company until 1981. In 1981 Mr. Zink acquired a contract machine shop, Product Manufacturing Company, and

changed its name to Zeeco. Another company, Zinkco, Inc., was organized and began selling items manufactured by Zeeco, including replacement parts for John Zink Company's burners.

On March 22, 1985, John Zink Company initiated this case by filing its COMPLAINT FOR TRADEMARK, SERVICE MARK AND TRADE NAME INFRINGEMENT AND UNFAIR COMPETITION. [Dkt. 1]. Among other things, the complaint alleged:

> [S]ubsequent to plaintiff's termination of defendant Zink's affiliation with plaintiff, defendants began to use the names and marks JACK ZINK, JOHN S. "JACK" ZINK, and ZINKCO (hereinafter collectively referred to as defendants' ZINK names and marks) in connection with marketing of fuel burners, and spare parts and services for fuel burners[.]

[Dkt. 1, p. 4; ¶ 13].

On December 18, 1986, following a nonjury trial, Chief Judge H. Dale Cook issued findings of fact and conclusions of law finding, in part:

> [T]he use of ZINK, JOHN S. ZINK, JACK ZINK, and ZINKCO by defendants is unlawfully similar to the use of ZINK and JOHN ZINK by plaintiff and is likely to cause confusion in the market place.

John Zink Co. v. Zinkco, Inc., 2 USPQ2d 1606, 1609 (N.D. Okla. 1986), [Dkt. 55, p. 8]. Judgment was issued in favor of plaintiff John Zink Company against defendants Zinkco, Inc. and John S. Zink on plaintiff's claim for violation of the federal trademark laws, [Dkt. 56], and a writ of injunction was issued:

> Zinkco, Inc. and John S. Zink, . . . are PERMANENTLY ENJOINED from the use of the names and marks ZINK, JACK ZINK, JOHN ZINK and ZINKCO from being the trade names and marks of defendants Zinkco, Inc. or John S. Zink,

* * *

> John S. Zink and his heirs, successors and assigns and all those now or hereafter in privity, cooperation or participation with him or his heirs, successors or assigns, are PERMANENTLY ENJOINED from using the name ZINK, JACK ZINK, JOHN ZINK or JOHN S. "JACK" ZINK in any type of competitive sales endeavors in the business of "gaseous fuel burners and liquid fuel burners and associated parts and component parts of such burners,"

[Dkt. 54, p. 2].

On December 31, 1986, defendants Zinkco, Inc. and John Smith Zink filed their COMBINED MOTION FOR NEW TRIAL, REQUEST FOR CLARIFICATION AND REQUEST FOR TIME TO COMPLY wherein they sought clarification of the Writ of Injunction and amendment of it to specifically permit usage of John S. Zink as a personal identifier and reference for Mr. John Smith Zink. [Dkt. 57].

On May 13, 1987, the Court held a hearing on that motion and others. Mr. Zink sought a determination that he could continue using his name as a personal identifier. Relevant excerpts from that hearing follow:

> MR. GREEN (counsel for Mr. Zink):
> [I]t was our interpretation that Your Honor had left for Mr. Zink the use of John S. Zink as a personal identifier in the business that he is in, which is competitive with the plaintiff. That we understand very clearly that he may not use that name or that name as a mark or trademark, but we understood the second paragraph to save unto him the right to use his name on documents, in making sales calls and that sort of thing, and also to be able to put out some types of publicity and that sort of thing where he could identify himself by his name. . .

[5/13/87 Tr. p. 13]. The Court explained its intention with respect to the Writ of Injunction and acceptable use of Mr. Zink's name:

THE COURT: Well, let me say that in preparing this particular paragraph, I gave some prolonged thought to it, and it was very carefully worded. The purpose was to permit Mr. Zink to continue to operate and to act as an individual using his proper name as he is known and has been known, but to prevent it [his name] from being linked to competitive sales endeavors in the particular business, as I put it gaseous fuel burners and so forth.

The name Zinkco with the Zink name, and you link the two together, and you get an unfortunate competitive representation to the John Zink Company.

It was my purpose to permit Mr. Zink to sign a letter using his true name, but not to use the Zink name, as such, in competing in this particular endeavor, in this particular commerce.

* * *

Now, it's true Mr. Zink has every right to compete, and he has the right to compete in all lawful ways, but in this particular instance, he sold the name John Zink in the John Zink Company, and I -- it's my feeling that a name should be found that drops the name Zink. There isn't any question in my mind but the utilization of the name Zink is to utilize the reputation -- I'm sure Mr. Zink would say his personal reputation with no relationship to the John Zink Company -- but the fact is, there is almost no way you can separate those two. And some effort is going to have to be made to create a separation so that *Mr. Zink can use his name in a non-commercial way* -- and I'm not saying he can't sign a business letter or anything of that nature. He can, *provided it's not the utilization of the name for a commercial purpose in the sale of and in the promotion of these particular products.* And I don't know whether that explanation verbally helps you or not. [emphasis supplied].

MR. GREEN: May I address the Court and ask a question?

THE COURT: Yes.

MR. GREEN: Your Honor, we have proceeded -- the defendants have proceeded to do business under the name of Zeeco, Z-E-E-C-O, Inc., and attempted and started that conversion almost immediately after Your Honor's order. . . .

> Our dilemma is, is that in listening to Your Honor, I hear you say that if you have a name that is -- that takes the Zink out, a company that takes the Zink out, and we feel like we have done that by using the Zeeco, then is he permitted to use his name?
>
> THE COURT: *For what purpose, is the Court's inquiry? And that is the crux of the injunctive order. . . . And that is why it was worded the way it was.* [emphasis supplied].
>
> * * *
>
> I didn't preclude him from signing documents, but I don't want those documents put on the front page of the paper or advertised, and that is the point.

[*Id.* at 18-23].

On December 10, 1987, defendants filed DEFENDANTS REQUEST FOR INSTRUCTION FROM THE COURT [Dkt. 123] in which Mr. Zink argued that the terms of the February 25, 1972, sale of John Zink Company to Sunbeam did not preclude or restrict use of his personal name. He urged the court to clarify the language in the Writ of Injunction by inserting the words "trade name or part of a trade name" into paragraph two which prohibits use of Zink, Jack Zink, John Zink or John S. "Jack" Zink. The matter was referred to Magistrate Judge Jeffery Wolfe, who found "the requested clarification would do violence to the meaning of the original text. . . . The language of the Injunction is sufficiently specific while remaining flexible enough to embrace changes in Defendants' corporate name within its scope. The United States Magistrate finds no need for clarification exists." [Dkt. 129]. No objections to the report and recommendation were filed and the district court adopted the recommendation denying the defendants' request for instruction. [Dkt. 131].

The John Zink Company filed the present motion for contempt on May 2, 1997, [Dkt. 180], alleging that defendant Zinkco's successor, Zeeco, and Mr. Zink have featured Mr. Zink's name in advertisements and promotional materials in violation of the Writ of Injunction, for which plaintiff seeks reimbursement of its expenses in prosecuting the motion and the cost of mounting an advertising campaign to counteract the alleged damage caused by defendants' actions. Apart from use of the Zink name, John Zink Company also alleged defendants have engaged in misleading and deceptive advertising and have violated John Zink Company's JZ trademark.

STANDARD FOR CIVIL CONTEMPT

A party alleging contempt and seeking a civil remedy must prove it by clear and convincing evidence. *Reliance Ins. Co. v. Mast Const.Co.*, 84 F.3d 372, 377 (10th Cir. 1996). The facts hereafter certified were proven by clear and convincing evidence.

FINDINGS OF FACT

1. On December 18, 1986, this Court entered Findings Of Fact And Conclusions Of Law finding Defendants, Zinkco, Inc. and John Smith Zink, "guilty of misappropriating John Zink Company's trade names." The Court specifically found that "use of ZINK, JOHN S. ZINK, JACK ZINK, and ZINKCO by defendants is unlawfully similar to the use of ZINK and JOHN ZINK by plaintiff and is likely to cause confusion in the market place." The Court also found that promotional letters used by Zinkco contained information which could cause a reasonably prudent purchaser to confuse Zinkco with the John Zink Company, including:

(1) "Use of the ZINK name."

(2) "Reference to a John S. 'Jack' Zink owned company."

(3) "Signature of Jack Zink, as president."

(4) "Reference to a John S. 'Jack' Zink owned company combined with reference to 'nearly 100 years combined experience in the combustion field' when in fact Zinkco has only been in existence since 1982." [Dkt. 55, FOF ¶ 20].

2. On the same date, the Court entered a Writ of Injunction permanently enjoining Zinkco, Inc., John Smith Zink and their successors from "using the name ZINK, JACK ZINK, JOHN ZINK or JOHN S. 'JACK' ZINK in any type of competitive sales endeavors in the business of 'gaseous fuel burners and liquid fuel burners and associated parts and component parts of such burners[.]'" [Dkt. 54, p. 2].

3. No appeal was taken from the 1986 Judgment against Zinkco, Inc. and John Smith Zink for their violations of federal trademark laws.

4. Zeeco admitted that it had actual notice of the Writ of Injunction and is subject to its provisions.

5. In response to Defendants' request for clarification of the injunction, the Court, Chief Judge H. Dale Cook, issued a ruling from the bench on May 13, 1987, stating that although the injunction did not preclude Mr. Zink from using his name as a personal identifier, the purpose of the injunction was to "prevent [his name] from being linked to competitive sales endeavors in the particular business" of gaseous burners. [5/13/87 Tr. p. 6-9].

6. In 1982 Mr. Zink engaged the services of patent and trademark attorney Paul Johnson who advised him that he could not use his own name in competing with the John Zink Company. [11/17/97 Tr. pp. 34, 61-62].

7. At some point after the May 13, 1987, "clarification," but before the subject advertisements were run, Mr. Zink had lunch with Chief Judge H. Dale Cook who told him if he was worried about suit over the use of his name he could seek a declaratory judgment or get an opinion from an attorney. [11/17/97 Tr. p. 79].

8. In 1996 Mr. Zink returned to attorney Paul Johnson's law firm to obtain an opinion concerning the use of his name in light of the injunction. The matter was handled by attorney Serge Novovich who reviewed proposed Zeeco advertisements and rendered the opinion that "the advertising in question is within the permitted activity and does not violate the restrictions set forth in the injunction." [Def. Ex. 28]. Mr. Novovich interpreted the injunction as prohibiting only the specifically listed permutations of the Zink name.

9. Although the John Zink Company argued that defendants failed to supply Mr. Novovich with sufficient information to render an adequate opinion, Mr. Novovich did not rely upon the defendants to supply any of the information he considered in rendering his opinion. The John Zink Company did not prove that the defendants withheld any information from Mr. Novovich.

10. Although there was some evidence to the contrary, the Court is persuaded that Zeeco did not begin its ad campaign until receiving the advice of counsel.[1]

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[1] Following the hearing, the parties have submitted letters to the Court addressing deadline dates for ad publications. The information in those letters does not constitute evidence and has not been considered by the Court

11. From August 1996 to May 1997, Zeeco caused advertisements to be published in several trade magazines: Hydrocarbon Processing, Fuel Management & Technology, Chemical Equipment, Environmental Engineering World, Process Heating, and EEZ Technology. The ads featured a photograph of defendant John Smith Zink together with the signature, "John Smith Zink," and the printed words "John S. Zink, Founder Zeeco, Inc."

12. On July 1, 1997, the text of Zeeco's Internet Web Site <www.zeeco.com> used the names "John S. Zink," "John Smith Zink," and "John Smith (Jack) Zink" in promoting Zeeco and its products. [Def. Ex. 16(A), 16(C), and 16(D)].

13. Since the Writ of Injunction was issued, letters sent to *prospective* Zeeco customers have featured the name "John S. Zink" as founder of Zeeco, others have been signed by Mr. Zink as "John S. Zink" and contain the typewritten name "John Smith (Jack) Zink." [Pl. Ex. 16, 29].

14. Upon becoming aware of the Zeeco ad campaign, Plaintiff acted promptly in conducting its investigation and filing its motion for contempt.

CONCLUSIONS OF LAW

1. The sole matter properly before the Court concerns enforcement of the injunction as it relates to the use of the Zink name. The allegations of misleading and deceptive advertising, alleged confusion in the market place, and use of the JZ mark were not

addressed in the injunction and are not properly before the Court for resolution on a motion for contempt.[2]

2. The permanent injunction issued by the Court on December 18, 1986 ("the Injunction") remains in full force and effect and must be obeyed unless and until "it is reversed by orderly and proper proceedings." *United States v. United Mine Workers,* 330 U.S. 258, 293, 67 S. Ct. 677, 91 L.Ed. 884 (1947).

3. The district court has broad discretion in using its contempt powers to compel obedience with the Injunction. *United States v. Riewe,* 676 F.2d 418, 421 (10th Cir. 1982).

4. Defendants argue that their use of the Zink name did not violate the injunction because they did not use any of the specific permutations of the name it prohibited.

Federal Rule of Civil Procedure 65(d) requires that "[e]very order granting an injunction . . . shall be specific in terms; shall describe in reasonable detail . . . the act or acts sought to be restrained." Rule 65(d) "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard,* 414 U.S. 473, 476, 94 S.Ct. 713, 715, 38 L.Ed.2d 661 (1974) [citations and footnote omitted]. Consequently, a person will not be held in contempt of an order unless that order has given him fair warning that his acts were forbidden. But, where an

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[2] Because this matter was befoe the Court without a jury, the Court permitted presentation of evidence on these matters in order to fully develop the record with the confidence that the Court could separate the relevant from the irrelevant.

injunction gives fair warning of acts prohibited, it cannot be avoided on mere technical grounds. *U.S. v. Christie Industries, Inc.*, 465 F.2d 1002, 1006-07 (3rd Cir. 1972).

The 1986 injunction at issue in this case does not specifically list "John Smith Zink," "John S. Zink," and "John Smith (Jack) Zink" among the prohibited uses of the Zink name. However, the text of the injunction does warn that *all* use of the Zink name in competition with the John Zink Company is prohibited. The Writ of Injunction enjoins defendants "from using the name ZINK . . . in any type of competitive sales endeavors[.]" [Dkt. 54, p. 2]. Thus, irrespective of Mr. Novovich's opinion, the text of the injunction gives Defendants fair warning that, regardless of the specific permutations of the Zink name listed, all use of "the name ZINK . . . in any type of competitive sales endeavors in the business of 'gaseous fuel burners and liquid fuel burners and associated parts and component parts of such burners'" is prohibited. Use of John Smith Zink, John S. Zink, and John Smith (Jack) Zink in Zeeco advertisements, in the Zeeco web site, and in letters sent to prospective Zeeco customers are uses of the name ZINK in competitive sales endeavors in the business of gaseous and liquid fuel burners and are therefore violations of the specific terms of the injunction.

5. Another reason that the injunction's application is not limited to the specific listed permutations is that an injunction must be "read in light of the issues and the purpose for with the suit was brought, and the facts found must constitute a plain violation of the decree so read." *Terminal R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 29, 45 S.Ct. 5, 8, 69 L.Ed 150 (1924). The injunction must be construed in light of the circumstances that produced it, which includes the nature of the original claim, the relief sought, the

evidence presented at the trial, the issues actually decided, and the mischief the injunction was designed to eradicate. *Youakim v. McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995). In other words, the terms of an injunction, like any other disputed writing must be construed in their proper context. *Id.*

The allegations in the complaint for trademark infringement relate to the use of the names "Jack Zink," "John S. 'Jack' Zink," and "Zinkco." [Dkt. 1, p. 4, ¶ 13]. The prayer asks that defendants be enjoined from using the names or marks "JOHN ZINK, JOHN S. "JACK" ZINK, OR ZINKCO, or any other names or marks which contains the term ZINK[.]" *Id.* at p. 9, ¶ 1(a). In response to the issues plead and the evidence presented, the Court's findings of fact recites that the defendants used the names "ZINK, JOHN S. ZINK, JACK ZINK and ZINKCO" and that use of those names was unlawfully similar to the use of ZINK and JOHN ZINK by plaintiff. [Dkt. 55, FOF 20]. Construing the injunction in light of the circumstances which produced it, including the mischief it was designed to eradicate, this Court concludes that the listing of specific permutations of the Zink name were responsive to the specific issues raised and were not intended to exempt other permutations of the Zink name from the injunction.

6. In addition, the parties have agreed that the ruling on the issue of contempt should be informed not only by the language of the Injunction, but also by the Court's May 13, 1987 ruling on Defendants' motion to clarify. [11/19/97 Tr. p. 284; 302]. The Court is also convinced that consideration of the May 13, 1987 ruling is appropriate.

To the extent that the injunction could be construed as leaving any doubt as to its intent, that doubt was removed by the Court's May 13, 1987, oral ruling on defendants'

motion to clarify. The Court made it clear that the purpose for which the Zink name was being used was the "crux of the injunctive order." [5/13/87 Tr. p. 21]. The Court stated that the injunction "didn't preclude [Mr. Zink] from signing documents, but I don't want those documents put on the front page of the paper and that is the point." [Tr. p.23]. Since Zeeco was in existence at the time of the May 13, 1987 ruling, and the motion to clarify was filed on Mr. Zink's behalf, the Court concludes that the defendants were informed that the purpose for which the Zink name was being used, not the specific permutation of the name, was the primary focus of the injunctive order. This conclusion is further bolstered by the Court's refusal of defendants' request to modify/clarify the injunction by limiting its prohibition of the uses of the Zink name to trade names. [*See* Dkt. 129, 131].

7. The holding in the case relied upon by defendants, *Madrigal Audio Laboratories, Inc. v. Cello, Ltd.,* 799 F.2d 814 (2nd Cir. 1986), does not affect the result in this case. *Madrigal* was a direct appeal and a cross-appeal from a district court order barring defendant, Levinson, an audio equipment designer who had conveyed the right to use his name as a trade name, from generating any publicity, oral or written about his association with a new company. The Second Circuit concluded that Levinson should not be barred from using his personal name unless an intention to sell his own name was clearly shown. Since the terms of the sale of the trade name did not evince such an intention, the Court concluded the injunction was not appropriate.

The question before the *Madrigal* Court was the propriety of the injunction vis-a-vis the terms of the sale. It is far beyond the scope of this proceeding to question the

propriety of the injunction or the terms of the sale of the John Zink Company, as the injunction was not appealed and has not been modified. Rather, the question before this Court is the interpretation of the injunction eleven years after it was entered. Thus application of the concepts considered in *Madrigal* is not appropriate.

8. Civil contempt is a "sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949). A compensatory award must be based on evidence of complainant's actual loss. *Allied Materials Corp. v. Superior Products Co, Inc.*, 620 F.2d 224, 227 (10th Cir. 1980).

Plaintiff seeks an order requiring defendants to pay an amount equal to Defendants' costs and expenses in creating and publishing the contemptuous advertisements to enable Plaintiff to run a corrective ad campaign. However, Plaintiff has not alleged or proven that it suffered any losses as the result of Zeeco's use of the Zink name. And, despite Plaintiff's financial ability to do so, it has not mounted a corrective advertising campaign. Although the Court has concluded that defendants' use of the Zink name in promoting Zeeco products and services violated the injunction, defendants are liable in a civil contempt proceeding only for actual damages. *Reliance Ins. Co. v. Mast Construction Company*, 84 F.3d 372, 377 (10th Cir. 1996). Even though the Tenth Circuit has approved awards for corrective advertising, *Big O Tire Dealers, Inc., v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977), this Court concludes that there must be proof of actual damage before such an award is appropriate. Since there was no proof of actual damage the Court declines to recommend an award for corrective advertising.

9. Plaintiff also seeks reimbursement of the attorneys fees and related investigation costs incurred in prosecuting its motion. After the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) there is a difference of opinion among the circuit courts over whether attorneys fees can be awarded in a civil contempt action absent a finding of *willful* contumacious conduct. In *Alyeska* the Court reversed a lower court award of attorneys' fees to a successful plaintiff where the plaintiff had performed the function of a private attorney general in enforcing a statue which did not provide for an award of attorneys' fees. In so doing the Court affirmed the so-called American Rule that successful litigants ordinarily are not entitled to recover attorneys' fees absent statutory authorization or an enforceable contract. In dicta, the Court recognized the existence of three judicially created exceptions to the American Rule where attorneys fees could be awarded to the successful litigant: (1) when a party has preserved or recovered a fund for the benefit of others; (2) when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons; and (3) for willful disobedience of a court order as part of the fine to be levied on the defendant. *Id.* at 1621-22.

The Fourth Circuit is alone in interpreting *Alyeska* as prohibiting an award of attorneys' fees in civil contempt cases absent a finding of *willful* disobedience of a court order. In *Wright v. Jackson*, 522 F.2d 955, 958 (4th Cir. 1975), the Fourth Circuit, relying on *Alyeska,* indicated that a contemnor's refusal to comply with a court order must rise to the level of obstinacy, obduracy or recalcitrance to satisfy the "willful disobedience" standard for an award of attorneys' fees. In an unpublished case, *Omega World Travel*

Inc., v. Omega Travel and Shipping Agencies, Inc., 905 F.2d 1530 (4th Cir. 1990)(Table), 1990 WL 74305, the court seemed to reiterate the willfulness requirement when it found that a district court did not abuse its discretion in refusing to award attorneys' fees where there was no finding of obstinace or recalcitrance.

In *Vuitton et Fils v. Carousel Handbags,* 592 F.2d 126, 130 (2nd Cir. 1979) the Second Circuit reversed a district court decision refusing to find defendants in civil contempt. The Court stated that on remand it would be appropriate to award attorney's fees, "if the violation of the decree is found to have been willful." This case is frequently cited for the proposition that a finding of willfulness is required before attorneys' fees may be awarded in the Second Circuit. However, in *Weitzman v. Stein*, 98 F.3d 717, 719 (2nd Cir. 1996), the Court acknowledged that "while willfulness may not necessarily be a prerequisite to an award of fees and costs, a finding of willfulness strongly supports granting them" thus indicating that attorneys' fees may properly be awarded in the absence of a finding of willful contemptuous conduct.

The Tenth Circuit has not addressed the issue, but the Fifth, Sixth, Seventh, and Ninth Circuits have approved attorney fee awards for civil contempt without requiring a finding of willfulness. The Sixth Circuit, *TWN Manufacturing Company, Inc. v. Dura Corporation,* 722 F.2d 1261 (6th Cir. 1983) and the Seventh Circuit, *Commodity Futures Trading Commission v. Premex, Inc.,* 655 F.2d 779 (7th Cir. 1981), have made that determination without any discussion of *Alyeska.* The Fifth Circuit, *Cook v. Ochsner Foundation Hospital*, 559 F.2d 270 (5th Cir. 1977) and the Ninth Circuit, *Perry v.*

O'Donnell, 759 F.2d 702 (9th Cir. 1985) specifically found that *Alyeska* did not abrogate the existence of the inherent authority of a court to enforce its orders.

Alyeska was not a contempt case. Therefore, the Court did not embark upon a reasoned consideration of whether a finding of willfulness is a prerequisite to an award of attorneys' fees in a civil contempt proceeding. The Supreme Court has often warned that its "opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 132-22, 65 S.Ct. 165, 168, 89 L.Ed. 118 (1944). The allusion in *Alyeska* to "willful" disobedience of a court order cannot reasonably be construed to resolve a question not before the Court, namely whether the inherent authority of a court to enforce compliance with its order following a violation of that order extends to the award of attorneys' fees occasioned by the contemnor's noncompliance, willful, or otherwise. *Link v. District of Columbia*, 650 A.2d 929, 932-33 (D.C. App. 1994). This Court rejects the defendants' argument that *Alyeska* contains a "clear mandate" which requires a finding of willfulness before attorneys' fees are appropriately awarded in a civil contempt action such as this.

This Court has not found Defendants to have engaged in "willful" disobedience of the injunction. However, even absent a finding of willfullness, an order requiring defendants to pay the reasonable attorneys' fees necessarily expended in bringing this action to enforce the injunction would serve the purposes of ensuring that the injunction

is followed in the future, and that the benefits conferred upon the John Zink Company by the injunction are not diminished by the attorneys' fees expended bringing the contempt to the attention of the Court. Accordingly the Court concludes that an award of reasonable attorneys' fees and costs is appropriate, the amount to be determined upon submission of appropriate documentation.

10. The facts do not support a finding of laches. Therefore, the Court rejects defendants' argument that plaintiff's recovery is barred.

11. The power to modify an injunction is among the inherent powers of the Court to enforce its orders. *Battle v. Anderson*, 708 F.2d 1523, 1539 (10th Cir. 1983). To avoid the possibility of any further costly litigation over the use of the Zink name, the district court should employ that power and modify the Writ of Injunction, as recommended below.

RECOMMENDATIONS

Based on the foregoing findings of fact and conclusions of law, the undersigned United States Magistrate Judge RECOMMENDS that an order be entered:

> (1) DISMISSING Defendant Zinkco from the contempt action;
>
> (2) FINDING Defendants Zeeco and John Smith Zink IN CONTEMPT for their violation of the December 18, 1986, Writ of Injunction;
>
> (3) AWARDING the John Zink Company the attorneys' fees and costs expended in the investigation of and prosecution of its motion for contempt in an amount to be determined upon submission of appropriate documentation to the Court; and
>
> (4) MODIFYING the Writ of Injunction to "PERMANENTLY ENJOIN Zeeco, its successors, assigns and all those now or hereafter in privity, cooperation or participation with it, and John Smith Zink and his heirs, successors and assigns and all

those now or hereafter in privity, cooperation or participation with him or his heirs, successors or assigns, from using the ZINK name or any permutation of initials, abbreviations, or nicknames referring to JOHN SMITH ZINK in any type of competitive sales endeavors in the business of gaseous fuel burners and liquid fuel burners and associated parts and component parts of such burners."

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), the parties are advised any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 19th day of February, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 23 Day of February, 1998.

A. Schuelke

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANDRE GREEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 97-CV-840 K
	)	
STANLEY GLANZ and	)	
RALPH E. DUNCAN, II,	)	
	)	
Defendants.	)	

ORDER

On September 15, 1997, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983, along with a letter, indicating a "check for $150.00 dollars" would be sent or hand-delivered. By order entered October 14, 1997, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he paid the $150.00 filing fee or submitted a motion for leave to proceed in forma pauperis pursuant to the Prison Litigation Reform Act, codified at 28 U.S.C. §1915(a), and a completed summons and Marshal form for each named Defendant. In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by October 30, 1997, and "failure to comply . . . will result in dismissal without prejudice of Plaintiff's *Complaint*." To date, Plaintiff has not submitted the required documents, nor has any correspondence to Plaintiff been returned to the Court.

Because Plaintiff has failed to comply with the Court's Order of October 14, 1997, and has failed to pay the filing fee or file a properly supported motion for leave to proceed in forma pauperis,

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the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute. See Fed. R. Civ. P. 41(b).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights *Complaint* is **dismissed without prejudice** for lack of prosecution.

IT IS SO ORDERED.

This 20 day of February, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHANNON SUTTER,
Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF TULSA and STANLEY GLANZ, Sheriff of Tulsa County,
Defendants.

Case No. 97-CV-230-K

JOURNAL ENTRY ON CONFESSION OF JUDGMENT

This cause comes on for hearing on this 20th day of February, 1998. Plaintiff, Shannon Sutter, appears through his attorney, John H. Lieber. Defendants Board of County Commissioners of the County of Tulsa and Stanley Glanz, Sheriff of Tulsa County, appear through their attorney of record, Fred J. Morgan, Assistant District Attorney. The Court finds that these parties have entered the following stipulations:

1. On January 12, 1998, the Board of County Commissioners of Tulsa County, Oklahoma, designated Lewis Harris, Tulsa County Commissioner, to represent the Tulsa County Board of County Commissioners at the Settlement Conference of February 4, 1998, and invested him with full settlement authority in this Settlement Conference.

2. On February 4, 1998, all parties reached a settlement at the Settlement Conference. The Board of County Commissioners of Tulsa County agreed to confess judgment in the case herein in the amount of ten thousand dollars ($10,000.00) under the following conditions:

> a. The Defendants are in no way admitting any liability or fault on the part of the Tulsa County Board of County Commissioners or Stanley Glanz, Sheriff of Tulsa County, or any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma;

b. That the Tulsa County Sheriff's Office will provide a neutral reference with a designated respondent in response to employment inquiries regarding the Plaintiff, Shannon Sutter, i.e. response will list his start date and ending date with no further information provided;

c. That Stanley Glanz, Sheriff of Tulsa County, will provide a letter on behalf of the Plaintiff, Shannon Sutter;

d. That Stanley Glanz, Sheriff of Tulsa County, will amend the personnel records of the Plaintiff, Shannon Sutter, to reflect a February, 1998, reinstatement and immediate resignation;

e. That payment of the settlement be paid by February 16, 1998, or the first day after filing of a judgment makes the money available;

f. That the settlement of this case will result in a full release of any and all past, present, or future claims against Defendants Tulsa County Board of County Commissioners, Stanley Glanz, Sheriff of Tulsa County, and any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma, which the Plaintiff has or may have as a result of the incidents alleged to have occurred herein;

g. That the settlement of this case will result in a full release of any and all past, present or future claims for attorney's fees under 42 U.S.C. §1988 and costs associated therewith against Defendants Tulsa County Board of County Commissioners, Stanley Glanz, Sheriff of Tulsa County, and any other unnamed employees of the Tulsa County Sheriff or Tulsa County, Oklahoma, which the Plaintiff or his attorney, John H. Lieber, may have as a result of this judgment;

h. This Journal Entry represents all agreements between the Plaintiff and the Defendants.

3. The Plaintiff is fully aware of the conditions upon which this confession of judgment is made and hereby fully accepts said conditions.

The Court accepts these stipulations and based upon said stipulations finds that the Plaintiff Shannon Sutter is entitled to recover the sum of Ten Thousand Dollars ($10,000.00) against the Board of County Commissioners of the County of Tulsa, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff recover judgment against the Board of County Commissioners of Tulsa County, Oklahoma, in the sum of Ten Thousand Dollars ($10,000.00) with interest from the date hereof at 9.22% per annum.

UNITED STATES DISTRICT JUDGE

JUDGMENT IN CASE NO. 97-CV-230-K APPROVED AS TO FORM AND CONTENT:

John H. Lieber

Attorney for Plaintiff

Fred J. Morgan
Assistant District Attorney

Attorney for Board of County Commissioners of the County of Tulsa and Stanley Glanz, Sheriff of Tulsa County

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 98CV0079K(M)
	)	
DELORES J. STEPHENS,	)	
	)	
Defendant.	)	

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of $2,885.88 and $2,180.39, plus accrued interest in the amounts of $450.00 and $313.66, plus administrative costs in the amount of $15.00, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that he is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Delores J. Stephens will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 28th day of February, 1998, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of $60.00, and a like sum on or before the 28th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Delores J. Stephens, in the principal amounts of $2,885.88 and $2,180.39, plus accrued interest in the amounts of $450.00 and $313.66, plus interest at the rate of 8% until judgment, plus filing fees in the amount of $150.00, plus interest thereafter at the current legal rate of 5.43 percent per annum until paid, plus the costs of this action.

Jerry C. Kern
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney

Loretta F. Radford
LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney

Delores J. Stephens
DELORES J. STEPHENS

2500-090

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BUEL H. NEECE and PEGGY J. NEECE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendants.

Case No. 88-CV-1327-E

STIPULATED JUDGMENT

The parties hereto do hereby stipulate, consent and agree to a Final Judgment in favor of the Plaintiffs, Buel H. and Peggy J. Neece, against the United States of America in the sum of $133,075.50 plus statutory interest thereon.

The amount of refund for 1982 income taxes for Buel H. Neece in a similar amount has been determined in the United States Bankruptcy Court for the Northern District of Oklahoma in Buel H. Neece v. United States of America, ex rel. Internal Revenue Service, Adversary Action No. 96-281-C.

IT IS SO ORDERED this 18th day of Feb., 1998.

THE HONORABLE JAMES O. ELLISON
SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(12)

AGREED AS TO FORM:

BARROW GADDIS GRIFFITH & GRIMM

By _____

William R. Grimm 3628
610 South Main, Suite 300
Tulsa, OK 74119-1248
(918) 584-1600
(918) 585-2444 (Fax)

ATTORNEYS FOR BUEL HAMPTON NEECE

STEPHEN C. LEWIS,
United States Attorney

By _____

Nanci S. Bramson
Trial Attorney, Tax Division
U. S. Department of Justice
P. O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
202-514-6520
202-514-6770 (Fax)

ATTORNEYS FOR THE UNITED STATES

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELIZABETH EMARTHLE,
SSN: 442-72-3987

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

ENTERED ON DOCKET
DATE FEB 23 1998

No. ~~96~~ 97-C-37-J

FILED
FEB 20 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 20th day of February 1998.

Sam A. Joyner
United States Magistrate Judge

[1/] On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELIZABETH EMARTHLE,
SSN: 442-72-3987

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of Social Security Administration,[1/]

Defendant.

ENTERED ON DOCKET
DATE FEB 23 1998

No. 97-C-37-J

FILED
FEB 20 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER[2/]

Plaintiff, Elizabeth Emarthle, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.[3/] Plaintiff assert that the Commissioner erred because (1) the ALJ incorrectly found that Plaintiff could perform work at all exertional levels, (2) the ALJ improperly assessed her mental impairment, (3) the ALJ relied on the absence of evidence to support his mental residual functional capacity, and (4) the ALJ presented an improper question to the

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1/ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

2/ This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

3/ Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on June 2, 1995. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 29, 1996. [R. at 6].

(15)

vocational expert. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff completed the tenth grade but did not obtain a GED. [R. at 51]. Plaintiff testified that she drank on weekends and disliked being around people. [R. at 52].

According to Plaintiff, she generally wakes up at 7:30, makes breakfast, watches television (about six hours each day), eats lunch, and walks approximately two miles. [R. at 56-57]. Plaintiff also reads about 20 minutes each day, walks for approximately three hours and believes that she could lift approximately 30 pounds. [R. at 57-61].

Plaintiff testified that she dislikes being around people and has panic attacks. [R. at 63]. Plaintiff, on a daily basis, walks to the Osage Ministries to use the phone and talk to the preacher or the lady who works at the ministry. [R. at 67]. Plaintiff believes she would be unable to work because she would become tired of lifting more than 20 pounds; she would become tired of doing the same thing all of the time; and she would not want to work that many days or be around that many people. [R. at 67].

Thomas Allen Goodman, M.D., testified at Plaintiff's hearing. He noted that Plaintiff had, on two occasions, been voluntarily admitted to a hospital but that she had discharged herself before an evaluation could be completed. [R. at 39]. He testified that Plaintiff was examined by Dr. Inbody on November 20, 1993 and he

concluded that she had a depressed mood and substance abuse. [R. at 41]. He noted that Dr. Inbody's GAF rating was 65. [R. at 41].

Dr. Goodman also testified that Plaintiff was hospitalized for four days in March 1995 and was diagnosed with alcohol dependency and an anxiety disorder. [R. at 42]. Dr. Goodman observed that her GAF rating was 21/30 which he explained as a 21 at the time that she was first seen in the hospital, and a 30 as the highest during the preceding year. Dr. Goodman noted that she was also given a GAF of 35/40 by Parkside.[4/] According to Dr. Goodman, with a GAF of 40 or 45 a reason exists for hospitalization. [R. at 43]. He testified that, with Plaintiff, she was sent to court and was discharged from inpatient care and sent to outpatient treatment. [R. at 43].

Dr. Goodman testified that the discrepancy between the GAF assessments existed because of the inaccuracy of the GAF. According to Dr. Goodman, the GAF has been used for only a few years and the reliability of it has not yet been established. [R. at 43]. In addition, Dr. Goodman noted that the GAF of 65 was from a board-certified psychiatrist who observed Plaintiff while she was functioning well and that Plaintiff denied drinking at that time. By comparison, the other GAF was assessed after Plaintiff had been on a binge and it was by a non-board member psychiatrist. [R. at 48].

[4/] The assessment at Parkside of 35/40 and at Eastern State of 21 occurred during the same time period.

Dr. Goodman also testified that according to the blood tests, and Plaintiff's liver enzymes, Plaintiff has continued to drink. [R. at 44]. Dr. Goodman additionally testified that Plaintiff has never had outpatient psychiatric treatment. [R. at 46].

A Psychiatric Review Technique Form ("PRT") completed by Stephen J. Miller, Ph.D., on December 2, 1993 notes that Plaintiff's impairment is "not severe." [R. at 88]. He recorded Plaintiff's activities of daily living and difficulties in social functioning as "slight," her deficiencies of concentration as "seldom," and her episodes or work deterioration as once or twice. [R. at 88].

Plaintiff informed a telephone interviewer that she did not go to a mental health clinic, that she knew the importance of the scheduled examination (by the social security examiner), and that she would get to the examination by taking the bus. [R. at 98].

A PRT Form completed by Carolyn Goodrich, M.D., on December 22, 1994 noted that Plaintiff's impairment was "not severe." [R. at 100]. Plaintiff's restrictions of daily living were "none," her difficulties in maintaining social functioning were "slight," her deficiencies of concentration were "never," and her episodes of deterioration were "never." [R. at 103]. The assessment was affirmed as written by R.E. Smallwood, Ph.D., on January 19, 1995. [R. at 101].

Donald R. Inbody, M.D., examined Plaintiff on November 15, 1993. He noted that Plaintiff's "speech was logical, coherent and sequential with no affective disturbances or associational defects in thinking. No psychotic symptomatology was noted. . . . She did not appear to be particularly anxious but on several occasions

became very tearful as she discussed having 'messed up my life and having to lose my children'."[5/] Dr. Inbody concluded that Plaintiff had an adjustment disorder with depressed mood - moderate, and a history of alcohol dependency. [R. at 173-74]. He assessed her GAF at 65. [R. at 174].

Dr. Inbody again examined Plaintiff in December of 1994. He concluded that Plaintiff had "depression, NOS, moderate, without psychotic features." He again assessed Plaintiff with a GAF of 65. [R. at 207-08].

Plaintiff was treated for hypertension at the Indian Health Clinic on a regular basis. [R. at 179-200].

Plaintiff was admitted on an emergency basis from Tulsa County to Eastern State Hospital on March 13, 1995. [R. at 210]. Plaintiff drank a twelve pack of beer prior to admission and was treated at Hillcrest Medical Center for alcohol intoxication. Plaintiff was then transferred to Parkside Hospital and then to Eastern State Hospital. [R. at 213, 219-225, 227-229]. At Parkside, Plaintiff was briefly assessed as having "depression NOS, alcohol intoxification." [R. at 229]. Her LOF was noted at 35/40. [R. at 229]. At Eastern State Hospital, Plaintiff was observed as nervous and agitated with anxiety. She was diagnosed as having "generalized anxiety disorder," with a history of alcohol abuse. Her GAF was assessed at "21" on admission, and 21/30 on discharge. [R. at 210, 213-14]. Plaintiff's physical examination reported a normal gait

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[5/] The record indicates that Plaintiff gave each of her three children up for adoption. One child while an infant, one child at age eleven, and one child was adopted by Plaintiff's brother and is now five. [R. at 207]. The treatment records at Eastern State indicate that the children were adopted due to Plaintiff's alcohol-related problems. [R. at 214].

and normal coordination. [R. at 216]. Plaintiff left the hospital on March 16, 1995 to attend a mental health hearing in Tulsa County. Plaintiff was ordered released and to follow-up outpatient care. Plaintiff was therefore discharged from Eastern State Hospital on March 17, 1995, because she did not return from the hearing in Tulsa County. [R. at 211]. On discharge, Plaintiff was noted as "friendly. She had bene [sic] playing cards. She was not showing any signs of psychosis. She was not showing any signs of suicidal or homicidal ideations or gesturing." [R. at 211].

A PRT Form completed November 7, 1995 noted that Plaintiff had "slight" restriction of daily living, "moderate" difficulties in maintaining social functioning, "often" deficiencies of concentration, and "once or twice" episodes of deterioration. [R. at 260]. The examiner noted that "no evidence of significant impairment except chronic alcohol abuse."[6/] [R. at 263]. The examiner additionally completed a Mental Residual Functional Capacity Assessment. The majority of the entries were indicated as "not significantly limited," with a few indicated as "moderately" limited. [R. at 262].

[6/] On March 29, 1996, the Social Security Act was amended to deny disability and SSI benefits to individuals whose disabilities are the result of alcoholism or drug addiction. The effective date is unclear, but Congress appears to have intended that the amendments apply retroactively. See Technical Amendments Relating to Drug Addicts and Alcoholics, Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5525, 5528 (enacted August 5, 1997). The "key factor" in determining whether the drug addiction or alcoholism is a "contributing factor material to the determination of disability" is whether the claimant "would still [be found] disabled if [the claimant] stopped using drugs or alcohol." 20 C.F.R. §§ 404.1535, 416.935 (1996). The Court does not further discuss the amendments or the affect on this case because the ALJ's decision can be affirmed without attempting to determine whether Plaintiff's alcoholism was a contributing factor to her alleged disability.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

Disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . .

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

> physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.[7/] See 20 C.F.R. § 404.1520.

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

[7/] Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary[8/] as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or

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8/ Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff had no significant physical limitations which interfered with her ability to work. With respect to her alleged mental limitations, the ALJ found, based on the record, that Plaintiff was capable of performing a variety of daily living and social functioning tasks. The ALJ observed that although Plaintiff testified that she could not be around people due to panic attacks, that she also testified that she went to the Osage Ministries each day to visit and use the phone. Based on the record, and the testimony of the vocational expert, the ALJ concluded that a significant number of jobs existed which Plaintiff was capable of performing.

IV. REVIEW

Residual Functional Capacity

Plaintiff initially asserts that the ALJ erred by finding that Plaintiff could perform work at all exertional levels. Plaintiff states that she testified that she could lift only 30 pounds and the ALJ therefore erred in concluding that Plaintiff could lift more than 30 pounds.

The testimony of the Plaintiff does not fully support Plaintiff's argument. The ALJ asked Plaintiff "how much do you feel you can lift if you had to?" The Plaintiff answered "30 pounds, I think." [R. at 58]. Plaintiff also stated, in response to whether she could perform a job which required lifting twenty pounds that she would

get tired of lifting twenty pounds. Nothing in the record indicates any physical restrictions which would interfere with Plaintiff's ability to lift.

Regardless, Plaintiff complains only that she is unable to lift more than 30 pounds and that the ALJ therefore erred in finding that she could do all ranges of work. The hypothetical question presented to the vocational expert did note that Plaintiff could perform the exertional demands of sedentary, light, and medium work. [R. at 72]. The answer by the vocational expert included numerous jobs in both the light and sedentary exertional range, all of which would not include lifting more than thirty pounds. [R. at 75]. Consequently, even if the ALJ had erred by finding Plaintiff capable of performing medium work, and those jobs in the medium exertional level are excluded, substantial evidence exists that Plaintiff could perform a significant number of jobs in the sedentary and light exertional levels.

Mental Impairment

Plaintiff additionally asserts that the ALJ ignored the findings by psychiatrists at Eastern State Hospital who, in March of 1995, noted that Plaintiff had a Global Assessment of Functioning ("GAF") of 21 at the time, 30 during the prior year and 40 the year before. Plaintiff attached a copy of the GAF form to her brief.[9/] Plaintiff also notes that a separate examiner concluded that Plaintiff had a GAF of 65. Plaintiff asserts, however, that the ALJ erred by considering the GAF of 65 while ignoring the lower GAF assessments.

9/ The Court notes that the attachment of such documents is improper unless the document also appears in the record. In this case, the record contains a similar document at p. 243.

Initially the Court notes that absent testimony or record evidence explaining the significance of a "GAF," the Court is unable to separately evaluate the ALJ's assessment or failure to assess the differing scores. The Court merely reviews the findings of the ALJ and considers whether such findings are supported by substantial evidence. The Court has no separate psychiatric expertise and, absent appropriate evidence in the record, is unable to judge the significance of a "GAF" score.

Plaintiff was admitted on an emergency basis to Hillcrest Hospital after drinking a twelve pack of beer. After admission, Plaintiff was transferred to Parkside for a short period of time. Plaintiff was then transferred to Eastern State Hospital. [R. at 213, 219-225, 227-229]. At Parkside, Plaintiff was assessed as having "depression NOS, alcohol intoxification." [R. at 229]. Her LOF was noted at 35/40.[10/] [R. at 229]. At Eastern State Hospital, Plaintiff was diagnosed as having "generalized anxiety disorder," with a history of alcohol abuse. Her GAF was assessed at "21" on admission, and 30 on discharge. [R. at 210, 213-14]. Plaintiff left the hospital on March 16, 1995 to attend a mental health hearing in Tulsa County. Plaintiff did not return after the court hearing and was therefore discharged from Eastern State Hospital on March 17. [R. at 211]. On discharge, Plaintiff was noted as friendly, playing cards, and showing no signs of psychosis. [R. at 211].

At two separate examinations by Dr. Inbody, he noted that Plaintiff had a GAF of 65. In addition, a PRT Form completed by Dr. Miller, on December 2, 1993 notes

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[10/] The record does not specifically indicate a definition for "LOF." Based on the testimony by the hearing doctor, and the brief by the Plaintiff, the parties appear to use LOF and GAF interchangeably.

that Plaintiff's impairment is "not severe." [R. at 88]. He recorded Plaintiff's activities of daily living and difficulties in social functioning as "slight," her deficiencies of concentration as "seldom," and her episodes or work deterioration as once or twice. [R. at 88]. A PRT Form completed by Dr. Goodrich, on December 22, 1994 also noted that Plaintiff's impairment was "not severe." [R. at 100]. Plaintiff's restrictions of daily living were "none," her difficulties in maintaining social functioning were "slight," her deficiencies of concentration were "never," and her episodes of deterioration were "never." [R. at 103]. The assessment was affirmed as written by R.E. Smallwood, Ph.D., on January 19, 1995. [R. at 101]. A PRT Form completed November 7, 1995 noted that Plaintiff had "slight" restriction of daily living, "moderate" difficulties in maintaining social functioning, "often" deficiencies of concentration, and "once or twice" episodes of deterioration. [R. at 260].

Plaintiff asserts that the ALJ erred by ignoring the lower GAF scores in favor of the higher GAF scores.

At the hearing, Dr. Goodman testified that GAF scores are unreliable because the tests have not existed for very long. In addition, according to Dr. Goodman, with a GAF of 40 or 45 a reason exists for hospitalization. [R. at 43]. Dr. Goodman testified that the discrepancy existed between the GAFs due to the inaccuracy of the GAF. In addition, Dr. Goodman noted that the GAF of 65 was from a board-certified psychiatrist who observed Plaintiff while she was functioning well and that Plaintiff denied drinking at that time. By comparison, the other GAF was assessed after

Plaintiff had been on a drinking binge and the assessment was by a non-board member psychiatrist. [R. at 48].

The record suggests that the GAF assessment is not fully reliable. Nothing in the records from Eastern State Hospital, during Plaintiff's three to four day stay indicates that the doctors who saw Plaintiff believed that she was disabled. On discharge, Plaintiff was reported as friendly, playing cards, and showing no evidence of psychosis. [R. at 211]. The Court concludes that the ALJ did not err by declining to conclude that the GAF assessment by the Eastern State Hospital doctors required a finding that Plaintiff was disabled.

Plaintiff additionally argues that the ALJ failed to give substantial weight to Plaintiff's treating physician, and, if a treating physician's opinion is to be disregarded, the ALJ is required to explain the reasons for disregarding the opinion. Assuming the three to four day admission at Eastern State qualifies the doctors who treated Plaintiff during her stay as "treating physicians," the Court concludes that the ALJ did not err by failing to give controlling weight to the GAF assessment of 21/30. As noted above, the record indicates that the GAF was not fully reliable. Regardless, nothing in the treatment records at Eastern State indicates that Plaintiff is fully disabled. Plaintiff's doctors at Eastern State offered no opinion as to her ability to work.

Absence of Evidence

Plaintiff asserts that the ALJ cannot rely on the "absence of evidence" to support his RFC assessment. Plaintiff states that the ALJ relied on nothing specific to support his conclusions and therefore the ALJ's RFC assessment was improper.

However, the record contains numerous RFC Assessments to support the ALJ's conclusions. Initially, Dr. Goodrich testified at the hearing and completed the PRT Form which the ALJ attached to his opinion. In addition, two separate examinations by Dr. Inbody, indicated that Plaintiff had a moderate adjustment disorder with depressed mood. [R. at 173]. A PRT Form completed by Dr. Miller, on December 2, 1993 notes that Plaintiff's impairment is "not severe." [R. at 88]. Plaintiff's activities of daily living and difficulties in social functioning are noted as "slight," her deficiencies of concentration are noted as "seldom," and her episodes or work deterioration are noted as once or twice. [R. at 88]. A PRT Form completed by Dr. Goodrich, on December 22, 1994 also noted that Plaintiff's impairment was "not severe." [R. at 100]. Plaintiff's restrictions of daily living were "none," her difficulties in maintaining social functioning were "slight," her deficiencies of concentration were "never," and her episodes of deterioration were "never." [R. at 103]. The assessment was affirmed as written by R.E. Smallwood, Ph.D., on January 19, 1995. [R. at 101]. A PRT Form completed November 7, 1995, noted that Plaintiff had "slight" restriction of daily living, "moderate" difficulties in maintaining social functioning, "often" deficiencies of concentration, and "once or twice" episodes of deterioration. [R. at 260].

Question to Vocational Expert

Plaintiff suggests that the ALJ's flaw in the assessment of her RFC tainted the remainder of the ALJ's analysis and the question presented to the vocational expert

was improper. Plaintiff also states that the question was improper because the ALJ did not include the GAF functioning of Plaintiff.

Initially, as discussed above, the Court concludes that the ALJ did not improperly assess Plaintiff's RFC. The Court additionally concludes that the ALJ did not err by declining to present the "GAF" scores to the vocational expert. Such scores are only significant to the extent that they have meaning to the vocational expert. The better practice is to present the specific mental limitations to the expert and permit the expert to determine, based on those specific limitations whether or not the individual can work.[11/] This is what the ALJ did. The ALJ asked whether the following individual could work.

> [An individual,] age 35, who has tenth grade education with good ability to read, write, and use numbers. Has the same past relevant work experience as the claimant in this case. Please assume I find the claimant capable of performing exertional demands of sedentary[,] light[,] and medium work, as those terms are defined in the Social Security Administration regulations. Please assume also the following nonexertional limitations. Individual would require a job with no balancing, no climbing of ladders, ropes, or scaffolds; no working around unprotected heights; require a low stress level job. I'm going to give you some mental restrictions.
>
> * * * *

[11/] In a similar manner, an ALJ does not inform a vocational expert that a claimant has diabetes and then ask the vocational expert if the individual can perform a significant number of jobs in the national economy. Rather, the ALJ gives any limitations which the claimant suffers from as a result of diabetes, and presents those limitations to the vocational expert. For example, the individual may be required to make frequent trips to the bathroom, or may have poor circulation and therefore be required to elevate his/her legs for 20 minutes each hour. These limitations are presented to the vocational expert, with the expert then testifying as to whether or not such an individual could perform substantial gainful activity.

> That individual would be moderately limited in the ability to understand and remember detailed instructions and to carry out detailed instructions; moderately limited in the ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; moderately limited in the ability to sustain an ordinary routine without special supervision; moderately limited in the ability to complete a normal workday and work week without interruptions from psychologically-based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; moderately limited in the ability to interact appropriately with the general public; moderately limited in the ability to travel in unfamiliar places or use public transportation; moderately limited in the ability to set realistic goals or make plans independently of others.

[R. at 72 - 74].

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 20 day of February 1998.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DERONN WRATHER, STEPHEN WILLIAMS, and VINCENT TURNER,

Plaintiffs,

vs.

THE CITY OF TULSA, a municipal corporation, MAYOR SUSAN SAVAGE and RON PALMER, in their official capacity as City of Tulsa executive officers, BILL YELTON, MICHAEL ECKERT, CHARLES JORDAN, STEVEN MIDDLETON, B. BONHAM, CHRIS WITT, Sgt. J. CLARK, both individually and in their official capacity as Tulsa Police officers, and OTHER UNKNOWN PERSONS, individually, and in their official capacities as Tulsa Police officers,

Defendants.

Case No.97-CV-435-BU (M)

REPORT AND RECOMMENDATION

The following defendants have filed motions to dismiss, asserting the defense of qualified immunity to this civil rights action brought pursuant to 42 U.S.C. § 1983: Bill Yelton [Dkt. 14], Sgt. J. Clark [Dkt. 15], Chris Witt [Dkt. 16], B. Bonham [Dkt. 17], Michael Eckert [Dkt. 18], Steven Middleton [Dkt. 19], and Charles Jordan [Dkt. 20]. The motions have been referred to the undersigned United States Magistrate Judge for report and recommendation.

BACKGROUND

Plaintiffs are African-Americans who attended a Ku Klux Klan rally at the Tulsa County Courthouse on May 4, 1996. After the rally had ended plaintiffs and others

(43)

were allegedly attacked by police officers with horses and pepper gas while they were peacefully gathered on a sidewalk at 6th and Denver across from the Tulsa County Courthouse. Mr. Turner was arrested and charged with disturbing the peace because he would not leave the area. Ms. Wrather verbally protested Mr. Turner's arrest and was allegedly grabbed by Officer Eckert and slammed to the ground as she tried to move away. She was charged with interfering with a police officer. Mr. Williams came to Ms. Wrather's aid and was seized by officers Jordan, Middleton, Yelton, Bonham, Witt and others. Plaintiffs allege he was "grabbed, beat, pepper gassed, and tortured" [Dkt. 1, p. 7, ¶ 34] although he was not fighting the officers in any way. Mr. Williams was arrested and charged with assault on a police officer. The charges against Mr. Turner and Ms. Wrather were dismissed. The judge presiding at Mr. Williams' trial directed a verdict of acquittal.

Plaintiffs seek monetary damages for alleged violation of rights guaranteed by the First, Fourth, Fifth, Sixth, Thirteenth, and Fourteenth Amendments to the Constitution of the United States of America. They also assert a number of state law claims: assault and battery, malicious prosecution, intentional infliction of emotional distress and false imprisonment. The parties have not addressed whether the officers might be entitled to immunity for the state law claims; therefore the Court has not addressed those claims in this report.

DISCUSSION

Motion to Dismiss and Qualified Immunity Standards.

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. *See Dixon v. City of Lawton,* 898 F.2d 1443, 1447 (10th Cir. 1990). Generally, a court should dismiss a civil rights claim only if it appears beyond doubt, assuming all factual allegations as true and construing all allegations in favor of the plaintiff, that plaintiff could prove no set of facts which would entitle him to relief. *Meade v. Grubbs*, 841 F.2d 1512, 1526 (10th Cir. 1988) (citing *Owens v. Rush*, 654 F.2d 1370, 1378-79 (10th Cir. 1981)).

However, a qualified immunity shields government officials performing discretionary functions from civil damages liability unless the official has violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In establishing qualified immunity, the Supreme Court has recognized that when government officials abuse their offices, an action for damages may offer the only realistic avenue to vindicate constitutional guarantees. This is balanced against the fact that suits against government officials can entail substantial societal costs, which include the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Id.*, 102 S.Ct. at 2736. The tension between vindication of constitutional guarantees on the one hand and effective discharge of official duties on the other is relieved by

granting qualified immunity when the official's actions are objectively reasonable when viewed in light of legal rules that are clearly established at the time the action is taken. *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). To give effect to the balance struck between vindication of constitutional rights and effective performance of public officials' duties, the contours of the right alleged to have been violated must be sufficiently clear that a reasonable official will know what he is doing violates that right. *Id.*, 107 S.Ct. at 3039. In *Anderson*, the Court illuminated the necessity of this rule, as follows:

> The operation of this [qualified immunity] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis*, 640 supra, 468 U.S., at 195, 104 S.Ct., at 3019.

Anderson, 107 S.Ct. at 3038-9.

However, it is not sufficient that somewhere in constitutional jurisprudence that the action forming the basis for suit has been held unlawful, it must be plead. Because qualified immunity protects a defendant from the burdens of trial as well as from liability, plaintiffs are required to "come forward with facts or allegations sufficient to show both that the defendants' alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (citing *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987)) [emphasis supplied]. Unless plaintiffs make such a showing, the defendant prevails. *Id.* In other words, to avoid dismissal on defendants' 12(b)(6) motion, plaintiffs are required to "articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995) [emphasis supplied].

Plaintiffs' Allegations.

Relying upon the background facts set forth above, the plaintiffs broadly allege that the defendants have violated their rights guaranteed under the First, Fourth, Fifth, Sixth, Thirteenth, and Fourteenth Amendments of the Constitution of the United States. The Thirteenth and Fourteenth Amendments directly deny the States the power to abridge the rights addressed in those Amendments. The rights guaranteed by the First, Fourth, Fifth, and Sixth Amendments to the Constitution are made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444,1446-47,

20 L.Ed.2d 491 (1968). However, where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver,* 510 U.S. 266, 114 S.Ct. 807, 813, 127 L.Ed.2d 114 (1994)(quoting *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989)). Therefore, the plaintiffs' claims are discussed within the context of the specific constitutional amendment providing the relevant protection.

First Amendment Claim.

Plaintiffs' complaint alleges that Defendant, police supervisor Jordan, ordered the plaintiffs to move from a public sidewalk and street and when they failed to move, he ordered a mounted horse and pepper gas attack upon them because they are of African-American descent. Plaintiffs further allege that "...forcing black men and women to leave a public place so that it can be used by white racists is never reasonably consistent with the United States Constitution, specifically amendments I, IV, XIII, XIV." [Dkt. 41, p. 6]. Under the traditional standard applied to Rule 12(b)(6) motions to dismiss the Court could not say that it appears beyond doubt that plaintiffs could prove no set of facts that would entitle them to relief under the First Amendment. However, because this case involves qualified immunity the analysis proceeds under the standard which requires plaintiffs to specifically articulate the clearly established constitutional right and the conduct alleged to have violated that right. *Romero,* 45 F.3d at 1475.

The plaintiffs allege only a general right to assemble and not be ordered to move from a public sidewalk based upon their race. While this right exists in a general sense, as the Supreme Court cautioned in *Anderson*: "if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." 107 S.Ct. at 3039. Plaintiffs bear the burden of *showing* with specificity both the facts and the law to establish that the defendants violated their constitutional rights under the myriad contours of the First Amendment's protections. There may be circumstances when requiring citizens to vacate a public sidewalk based on their race would be violative of the First Amendment. However, it has long been recognized that even in places such as streets and sidewalks that have traditionally been used for the quintessential First Amendment purposes of assembly, communicating thoughts between citizens and discussing public questions, the State may enforce reasonable time, place and manner restrictions. *Eagon v. City of Elk City, Oklahoma*, 72 F.3d 1480, 1486 (10th Cir. 1996). Plaintiffs have not cited a single authority to demonstrate that the current situation falls outside the "clearly established law" such that defendants are not entitled to qualified immunity.

Plaintiffs also allege that Ms. Wrather was arrested under an unconstitutionally vague city ordinance which makes it a crime to interfere with a police officer. Plaintiffs cite *City of Houston, Tex., v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), where the Supreme Court struck down a Houston municipal ordinance which made it illegal to, in any manner oppose, molest, abuse, or interrupt

a police officer in the execution of his duty as constitutionally overbroad and offensive to First Amendment rights. Although Plaintiffs claim that the ordinance under which Ms. Wrather was arrested is unconstitutional, they have not cited the text of the ordinance, nor have they presented any direct argument that the constitutionality of the ordinance is at issue. Plaintiffs have not met their burden to specifically articulate the law and facts to establish that Defendants are not entitled to qualified immunity on this claim.

Plaintiffs have had the opportunity, after hearing, to supplement their briefing, yet they have failed to cite any law respecting the specific contours of the First Amendment which they claim to be violated. The Court finds that plaintiffs have not met their burden to demonstrate that the Defendants are not entitled to qualified immunity with respect to their First Amendment claims. The undersigned United States Magistrate Judge therefore RECOMMENDS that plaintiffs' First Amendment claims be DISMISSED.

Fifth Amendment Claim.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C.A. Const. Amend. 5. Plaintiffs have not alleged conduct that would arguably violate any of the specific rights guaranteed by the Fifth Amendment, nor have they forwarded any argument with respect to any such claim. To the extent plaintiffs' complaint alleges that by virtue of their arrests they were deprived of liberty without due process of law, those claims properly fall under the specific protections of the Fourth Amendment right to be free from unreasonable seizure, not the Fifth Amendment. *Graham v. O'Connor*, 109 S.Ct. at 1871.

The Court finds that plaintiffs have not articulated with specificity the conduct alleged to have violated rights guaranteed by the Fifth Amendment. The undersigned United States Magistrate Judge, therefore, RECOMMENDS that plaintiffs' Fifth Amendment claim be dismissed.

Sixth Amendment Claim.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S.C.A. Const. Amend. 6. The Court finds that plaintiffs have not alleged conduct that would even arguably violate the rights guaranteed by the Sixth Amendment, nor have they forwarded any argument in support of their claim under the Sixth

Amendment. The undersigned United States Magistrate Judge, therefore, RECOMMENDS that plaintiffs' Sixth Amendment claim be dismissed.

Thirteenth Amendment Claim.

The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this Article by appropriate legislation.

U.S.C.A. Const. Amend. 13. "The Thirteenth Amendment not only prohibits slavery and involuntary servitude, but also gives Congress the power to prohibit actions that impose a 'badge of slavery' on citizens." *Robinson v. Town of Colonie*, 878 F.Supp. 387, 396 (N.D. N.Y. 1995)(quoting *Hawk v. Perillo*, 642 F.Supp. 380, 384 (N.D. Ill. 1985) which cited *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-43, 88 S.Ct. 2186, 2203-05, 20 L.Ed.2d 1189 (1968)).

The gravamen of plaintiffs' allegations in this regard is that they were treated differently because of their race, or color. Such an allegation is a Fourteenth Amendment equal protection claim. Since the plaintiffs have asserted a Fourteenth Amendment claim, and, since, in these circumstances, the Thirteenth Amendment does not offer any protection not already provided under the Fourteenth Amendment, the Thirteenth Amendment claim is redundant. The Court finds that plaintiffs have not met their burden to articulate with specificity any conduct alleged to violate the Thirteenth Amendment that is not otherwise addressed by the Fourteenth

Amendment. The undersigned United States Magistrate Judge, therefore, RECOMMENDS that plaintiffs' Thirteenth Amendment claim be dismissed.

Analysis of Claims of Fourth, and Fourteenth Amendment Violations.

The Fourth Amendment right to be free from unreasonable seizures is implicated by the plaintiffs' allegations concerning unlawful arrest and the force used. The relevant textual portion of the Fourteenth Amendment prohibits the states from "depriv[ing] any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Plaintiffs' allegations that the police took action against them, unlawfully arrested them and subjected them to excessive force because of their race are properly addressed under the equal protection clause of the Fourteenth Amendment.

Fourth Amendment Claims.

All three plaintiffs claim to have been wrongfully arrested. Plaintiffs have alleged Mr. Turner's arrest was unlawful because it was motivated by his race and that Mr. Turner did not disturb the peace as he was charged. Ms. Wrather's arrest is alleged to be unlawful because she committed no crime and because the Supreme Court has struck down an ordinance of another city concerning interfering with a police officer, as being unconstitutionally vague. Mr. Williams' arrest is alleged to be unlawful because he committed no crime and because he had a right to come to the aid of one (Ms. Wrather) being illegally seized. *Lusby v. T.G.& Y. Stores.,* 749 F.2d 1423, 1431-32 (10th Cir. 1984), *cert. granted, judgment vacated and remanded for*

reconsideration on other grounds, 474 U.S. 805, 106 S.Ct. 40, 88 L.Ed.2d 33, and *cert. denied,* 747 U.S. 818, 106 S.Ct. 65, 88 L.Ed.2d 53 (1985).

While there is no constitutional guarantee that only those guilty of a crime will be arrested, the Constitution requires that warrantless arrests be made on the existence of probable cause. *Romero*, 45 F.3d at 1480. Probable cause exists if the facts and circumstances within the arresting officer's knowledge or of which he has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense. *Romero*, 45 F.3d at 1476 (quoting *Hunter v. Bryant*, 502 U.S. 224, 228-229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991). Plaintiffs' allegations have sufficiently raised a probable cause question, which implicates the Fourth Amendment.

In addition to unlawful arrest, Ms. Wrather and Mr. Williams also allege that excessive force was employed in their arrests. It is beyond question that "[e]very person has the right to not be subjected to unreasonable or excessive force while being arrested or detained by a police officer." *Zuchel v. Spinharney*, 890 F.2d 273, 274 (10th Cir. 1989)(citing *Graham,* 109 S.Ct. at 1865). On the other hand, it is also well-established that in making an arrest, an officer has the right to use some degree of physical coercion or threat to effect the arrest. *Id., Graham*, 109 S.Ct. at 1871. The reasonableness of a particular use of force is to be judged from the perspective of a reasonable officer on the scene, rather than by hindsight.

The relevant question for qualified immunity purposes is whether the actions were reasonable in light of the circumstances confronting the officer. The Tenth

Circuit has recognized that while qualified immunity is a powerful defense in other contexts, it is of limited value in excessive force claims asserted under the Fourth Amendment because the substantive inquiry under the Fourth Amendment, whether the police officer reasonably could have believed that the force was necessary, is the same inquiry that determines the availability of qualified immunity. *See Mick v. Brewer,* 76 F.3d 1127, 1135 n. 5 (10th Cir. 1996); *Dixon v. Richer,* 922 F.2d 1456, 1463 (10th Cir. 1991); *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991). Because this is a motion to dismiss, and because the substantive and qualified immunity inquiries are the same, Defendants' motion to dismiss should be denied as to the Fourth Amendment excessive force claims. The Court finds that plaintiffs have properly asserted excessive force allegations against each of the police officer defendants.

Defendant Eckert is alleged to have employed excessive force in accomplishing Ms. Wrather's arrest. Defendants Yelton, Middleton, Bonham, Clark and Witt are alleged to have employed excessive force in accomplishing Mr. Williams' arrest. [Dkt. 41, p.2]. In addition, Defendant Jordan is alleged to be responsible because he was present when excessive force was allegedly being administered and failed to intervene. [Dkt. 41, p. 5]. "Tenth Circuit precedent [has] clearly established . . . that a law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983. *Mick v. Brewer*, 76 F.3d 1127, 1138 (10th Cir. 1996)(citing *Lusby v. T.G.&Y. Stores, Inc.,* 749 F.2d 1423, 1433 (10th Cir. 1984). The Court finds that plaintiffs have met their burden with

respect to alleging a Fourth Amendment claim against the police officer defendants.

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion to dismiss be DENIED with respect to plaintiffs' Fourth Amendment claims.

Fourteenth Amendment Claims.

Apart from a general substantive due process claim addressed elsewhere under the specific textual source of constitutional protection, plaintiffs have not articulated what aspect of the Fourteenth Amendment they claim was violated.

If Plaintiff Turner is attempting to assert a malicious prosecution claim under the Fourteenth Amendment, the Court notes that considerable controversy exists on whether such a claim is actionable under § 1983. *Albright v. Oliver*, 114 S.Ct. 807, 811 n. 4, (1994)(the extent to which a claim of malicious prosecution is actionable under § 1983 is one on which there is an "embarrassing diversity of judicial opinion"). However, in light of the plaintiff's ability to litigate this issue via his state claim for malicious prosecution, the Court declines to construe plaintiff's vague allegations to state a claim under § 1983.

If the plaintiffs are claiming § 1983 liability based on a claim of perjury or conspiracy to commit perjury, that claim is precluded as all witnesses, including police officers, are absolutely immune from § 1983 civil liability based on their testimony in a prior trial. *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991).

Plaintiffs may be attempting to present a selective enforcement claim under the Fourteenth Amendment equal protection clause. The Court notes that "the Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996). To state a claim of selective enforcement, plaintiffs must allege others have violated the law and have not been prosecuted or arrested, and that defendants have engaged in a deliberate selective process of enforcement based upon race or other arbitrary classification. *Butler v. Cooper*, 554 F.2d 645, 646 (4th Cir. 1977)(citing *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). *See also, United States v. Anderson,* 923 F.2d 450, 453 (6th Cir. 1991), *Wayte v. United States*, 470 U.S. 598, 608 n. 10, 105 S.Ct. 1524, 1531 n. 10, 84 L.Ed. 2d 547 (1985). In this case plaintiffs have not alleged that non-blacks were engaging in the same activity but not arrested. Indeed, plaintiffs' brief describes the event culminating in the arrests as "an unprecedented action in the recent history of the Tulsa Police Department . . ." [Dkt. 41, p. 2 and Dkt. 26, p. 1]. The blanket assertion that plaintiffs were arrested or prosecuted because of their race, without more, does not state a Fourteenth Amendment claim for selective enforcement or arrest.

If plaintiffs intended to assert a different basis for their Fourteenth Amendment claim, it has not been sufficiently articulated to meet their pleading burden when a qualified immunity is asserted. Therefore the undersigned United States Magistrate Judge RECOMMENDS that plaintiffs' Fourteenth Amendment claims be DISMISSED.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' Motions to Dismiss [Dkt. 14, 15, 16, 17, 18, 19, 20] be GRANTED in part and DENIED in part. The plaintiffs' claims of constitutional violations under the FIRST, FIFTH, SIXTH, and THIRTEENTH Amendments should be DISMISSED. Defendants' motion to dismiss plaintiffs' FOURTH Amendment claims made applicable to the states through the Fourteenth Amendment should be DENIED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 20th day of February, 1998.

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 23RD Day of February, 1998.

Linda M. Collins